Supreme Court, U.S.
FILED
MAR 12 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1979
No. 79-1406

CITY OF LOS ANGELES, a municipal corporation,

Petitioner,

vs.

GREATER WESTCHESTER HOMEOWNERS ASSOCIATION, etc., *et al.*,

Respondents.

Petition for Writ of Certiorari to the Supreme Court of the State of California.

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SUBJECT INDEX

Page

Opinions Below 1

Jurisdiction 2

Questions Presented 2

Constitutional Provisions and Statutes Involved 3

Statement of the Case 4

Prior Raising of Federal Issues 6

Statement of Reasons for Granting the Writ of Certiorari 7

1. Introduction 7

2. The Federal Aviation Act of 1958, as Amended and Implemented by the FAA and the EPA, and as Interpreted by the Burbank Court, Preempts the State of California From Exercising Its Police Power to Impose Nuisance Liability on an Airport Proprietor for Noise Created by Aircraft in Flight 8

3. If Airport Proprietors Are Held Responsible for the Award of Nuisance Damages, They Will Be Forced to Adopt Noise Abatement Rules and Regulations Which Will Conflict With Congressional Intent to Establish a Uniform National Policy to Control Aircraft Noise 12

(1) California Supreme Court's First Proposal—Pursuant to State Law, the City Could Acquire Through Condemnation Proceedings All Noise Impacted Property 12

Page

(2) California Supreme Court's Second Proposal—the City Could Acquire Air Easements 13

(3) California Supreme Court's Third Proposal—the City Has the Power to "Institute Reasonable Noise Abatement Procedures Which Do Not Conflict With Federal Law" 14

Conclusion 16

Appendix A. Opinion of the Supreme Court of the State of California .....App. p. 1

Bird, C. J., Concurring 23

Appendix B. Opinion of the Court of Appeal 30

Appendix C. Memorandum Opinion Re Intended Decision Regarding Recovery for Personal Injury and Emotional and Mental Distress 39

Appendix D. Federal Aviation Act of 1958. 49 U.S.C., 1301 et seq. Provisions Involved 70

Appendix E. Airport and Airway Development Act of 1970, 49 U.S. Code 1701 et seq. Provisions Involved 76

Appendix F. Noise Control Act of 1972. PL 92-574. Provisions Involved 77

TABLE OF AUTHORITIES CITED

Cases	Page
British Airways Board v. Port Authority of New York, 588 F.2d 75 (1977)	14
British Airways Board v. Port Authority of New York, etc., 564 F.2d 1002 (1977)	14
City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624 (1973)	2, 7, 8, 9, 11, 14, 15, 17
Griggs v. Allegheny County, 369 U.S. 84 (1962)	5, 11, 16
Luedtke v. County of Milwaukee, 521 F.2d 387 (7th Cir. 1975)	2, 9, 10, 11, 12, 17
Northwest Airlines, Inc. v. Minnesota, 322 U.S. 292 (1943)	5
San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959)	3, 9, 10, 11, 17
San Diego Unified Port Dist. v. Superior Court, 67 Cal.App.3d 361 (1977)	12
Miscellaneous	
FAA, Department of Transportation, Aviation Noise Abatement Policy (November 18, 1976), pp. 17, 18	13, 14
House Report 2440, 96th Cong., 1st Sess. 1979, "Aviation Safety and Noise Abatement Act of 1979"	13
Regulations	
Code of Federal Regulations, Title 14, Part 71	7
Code of Federal Regulations, Title 14, Part 73	7
Code of Federal Regulations, Title 14, Part 75	7

Page

Code of Federal Regulations, Title 14, Part 77 7

Code of Federal Regulations, Title 14, Part 91 7

Code of Federal Regulations, Title 14, Part 93 7

Code of Federal Regulations, Title 14, Part 95 7

Code of Federal Regulations, Title 14, Part 97 7

Statutes

Airport and Airways Development Act of 1970 (49 U.S.C. §1701 et seq) 3

California Civil Code, Sec. 3479 5

Federal Aviation Act of 1958, 72 Stat. 731 (49 U.S.C. §1301 et seq). 2, 3, 7, 8

Noise Control Act of 1972, 86 Stat. 1234 (Public Law 92-574) 3, 7 8

United States Code, Title 28, Sec. 1257(3) 2

United States Constitution, Art. I, Sec. 8, Clause 3 3

United States Constitution, Art. VI, Para. 2 3

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GREATER WESTCHESTER HOMEOWNERS ASSOCIATION, etc., *et al.*,

Respondents.

Petition for Writ of Certiorari to the Supreme Court of the State of California.

Petitioner, City of Los Angeles, a municipal corporation, respectfully prays that a Writ of Certiorari issue to the Supreme Court of the State of California, to review that Court's decision holding that the City of Los Angeles, as the airport proprietor of Los Angeles International Airport, must respond in nuisance damages as a result of noise emanating from aircraft in flight utilizing its airport facilities.

Opinions Below.

The opinion of the Supreme Court of the State of California, 26 Cal.3d 86 (1979), is set forth in Appendix A, hereto.[1]

[1]Hereinafter the decision will be referred to as *Greater Westchester*.

The opinion of the Court of Appeal of the State of California, Second Appellate District, 89 Cal.App.3d 954 (1979), appears in Appendix B. The Trial Court's Memorandum Opinion, dated September 30, 1975, while not reported in any official California Reports, is set forth in Appendix C.

Jurisdiction.

The decision of the California Supreme Court to be reviewed was entered on December 14, 1979; this Petition for Certiorari was filed less than ninety (90) days thereafter. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

This Court's review by certiorari is sought on the ground that the California Supreme Court has determined novel and substantial questions arising under the United States Constitution involving the application of this Court's decision in *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1973), in a manner directly contrary to a decision of the United States Court of Appeals in *Luedtke v. County of Milwaukee*, 521 F.2d 387 (7th Cir. 1975).

Questions Presented.

1. Does the Federal Aviation Act of 1958, as amended, and implemented by the Federal Aviation Administration (FAA) and the Environmental Protection Agency (EPA) preempt the State of California from exercising its police power to impose nuisance liability on an airport proprietor for noise created by aircraft in interstate flight?

2. Is the California Supreme Court opinion in *Greater Westchester* contrary to the United States Supreme Court holding in *City of Burbank v. Lockheed Air Terminal, Inc.*, which holds that the FAA has full

control over aircraft noise, thereby preempting state and local control, and *San Diego Building Trades Council v. Garmon,* 359 U.S. 236 (1959), which holds that an obligation to pay an award of damages is a form of regulation?

3. Will the award of nuisance damages compel airport proprietors to adopt noise abatement rules and regulations which will conflict with congressional intent to establish a uniform national policy to control aircraft noise, thus creating an undue burden on interstate commerce?

Constitutional Provisions and Statutes Involved.

Constitution of the United States, Article I, Section 8, Clause 3:

> "The Congress shall have power to regulate Commerce with foreign nations, and among the several States, and with the Indian Tribes;"

Constitution of the United States, Article VI, Paragraph 2:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made or which shall be made, under the authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the contrary notwithstanding."

The Federal Aviation Act of 1958, 49 U.S.C. §1301 *et seq.* (*see* Appendix D).

Airport and Airways Development Act of 1970, 49 U.S.C. §1701 *et seq.* (*see* Appendix E).

Noise Control Act of 1972, PL 92-574 (*see* Appendix F).

Statement of the Case.

Petitioner owns and operates Los Angeles International Airport (LAX), the third busiest, publicly owned commercial airport in the world. LAX serves approximately 35 million passengers a year and accommodates every major domestic trunk air carrier in the United States, as well as numerous foreign flag carriers.[2] It serves the residents of all of southern California and has a major impact on interstate commerce as well as the economy of the entire region. Each of the commercial airlines and/or their aircraft operating into and out of LAX has been issued:

> (1) a certificate of public convenience and necessity by the Civil Aeronautics Board (CAB), specifying that said airline is authorized to conduct operations into and out of LAX;
>
> (2) an air carrier operating certificate from the Administrator of Civil Aeronautics (now Administrator of the FAA) specifying that said airline is properly and adequately equipped and able to conduct a safe operation as an air carrier of persons and/or property and mail and scheduled air transportation; and
>
> (3) an air worthiness certificate from the Administrator of the FAA approving its use in certificated operations.

From the time the aircraft utilizing the facilities at LAX leave their designated gate positions, they are under the *exclusive control* of the FAA. The pervasive nature of this type of control was succinctly

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[2]For the fiscal year 1978-79, LAX handled 548,475 aircraft operations, which transported 127,286 tons of mail, 775,860 tons of airfreight/express and 34,606,964 passengers.

stated by Mr. Justice Jackson, concurring in *Northwest Airlines, Inc. v. Minnesota,* 322 U.S. 292, 303 (1943):

> "Federal control is intensive and exclusive. Planes do not wander about in the sky like vagrant clouds. They move only by federal permission, subject to federal inspection, in the hands of federally certified personnel and under an intricate system of federal command. At the moment a ship taxis onto a runway, it is caught up in an elaborate and detailed system of [federal controls]."

In 1969, persons residing in the vicinity of LAX instituted a lawsuit against Petitioner sounding in inverse condemnation and nuisance. In accordance with the principles enunciated in *Griggs v. Allegheny County,* 369 U.S. 84 (1962), the property owners were compensated for the "taking" of their property as a result of the aircraft noise.[3] In exchange, Petitioners were awarded air easements. The inverse condemnation portion of the lawsuit is not in dispute.

Following the award of inverse condemnation damages to the property owners, forty-one residents[4] were awarded the aggregate sum of $86,000 as nuisance damages caused by aircraft utilizing the facilities of LAX during the period 1967-75. The trial court based its award on California Civil Code §3479.[5] None

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[3]The date of "taking" for the inverse condemnation aspect of this case was established as June 24, 1967.

[4]Some of those awarded nuisance damages were not property owners; however, all those awarded nuisance damages were occupants in the single family residences which were the subject of the inverse condemnation action.

[5]Civil Code §3479 provides: "Anything which is injurious to health, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property . . . is a nuisance."

of those awarded damages were actually physically injured from the effects of aircraft noise.[6]

Prior Raising of Federal Issues.

Petitioner has raised the applicability of federal questions at each stage of the litigation: Los Angeles County Superior Court, California Court of Appeal and the Supreme Court of California. The questions were raised as follows:

1. Los Angeles County Superior Court (Trial Court)
   - First Amended Answer to First Amended Complaint filed October 17, 1969, eighth affirmative defense.
   - Pretrial Conference Order filed January 24, 1975, Items 40, 41, 44, and 45 of Section a.
   - Defendants' Opening Trial Brief. Topic I, filed December 5, 1974.
   - The Trial Court disposed of these matters as follows:

     Memorandum Opinion filed September 30, 1975 (Appendix C) which concluded "that the noise from jet aircraft using the north runways constitutes a nuisance."

2. California Court of Appeal, Second Appellate District
   - Appellant's Opening Brief (*see* Appendix B for disposition).
3. California Supreme Court
   - Petition for Hearing filed April 6, 1979 (*see* Appendix A for disposition).

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[6]See Trial Court's Memorandum Opinion (Appendix C).

STATEMENT OF REASONS FOR GRANTING THE WRIT OF CERTIORARI.

1. Introduction.

In 1973, after reviewing the provisions of the Federal Aviation Act of 1958,[7] the Noise Control Act of 1972,[8] and the regulations enacted pursuant to it,[9] this Court speaking through Justice Douglas stated in *City of Burbank v. Lockheed Air Terminal, Inc.*:

> "That act [The Noise Control Act of 1972] reaffirms and reinforces the conclusion that FAA, now in conjunction with EPA, has full control over aircraft noise, *preempting state and local control.*" 411 U.S. at 638. (emphasis added).

Justice Douglas continued by stating that while the:

> "[C]ontrol of noise is of course deep seated in the police powers of the states. . . . The pervasive control vested in the EPA and in the FAA under the 1972 Act seems to us to leave no room for local curfews *or other local controls.*" *Id.* at 638. (emphasis added).

The Court did not set forth "the ultimate remedy for the aircraft noise which plagues many communities and *tens of thousands of people* . . . ." *Id.* at 638. (emphasis added). However, the Court hinted that the remedy might be found in the procedures adopted in accordance with the Noise Control Act of 1972. These procedures involve the implementation of various rules and regulations relating to the control of aircraft noise. The Court noted that the Administrator of the FAA had already imposed regulations

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[7] 72 STAT 731, 49 U.S.C. §1301 *et seq.*

[8] 86 STAT 1234; P.L. 92-574.

[9] 14 C.F.R., Parts 71, 73, 75, 77, 91, 93, 95 and 97.

relating to takeoff and landing procedures, runway preferences, and noise standards which aircraft must meet as a condition to type certification. Finally, the Court emphasized that "[a]ny regulations adopted by the Administrator [of the FAA] to control noise pollution must be consistent with the 'highest degree of safety'." The interdependence of these factors the *Burbank* Court concluded ". . . requires a uniform and exclusive system of federal regulation if the congressional objectives underlying the Federal Aviation Act are to be fulfilled." 411 U.S. at 638, 639.

2. The Federal Aviation Act of 1958, as Amended and Implemented by the FAA and the EPA, and as Interpreted by the Burbank Court, Preempts the State of California From Exercising Its Police Power to Impose Nuisance Liability on an Airport Proprietor for Noise Created by Aircraft in Flight.

The rationale of the *Burbank* decision is that the delicate balance between aircraft safety and efficiency mandated by the Federal Aviation Act requires a uniform and exclusive system of federal regulation. The *Burbank* decision suggests that the ultimate remedy for noise impacted communities, while not known, lies with the procedures to be adopted under the Noise Control Act of 1972. Nowhere in the *Burbank* decision did the Court suggest that in addition to being responsible for inverse condemnation damages, the airport proprietor, who does not control aircraft in flight, should also be responsible for nuisance damages suffered by the residents from noise emanating from federally regulated aircraft.

The *Burbank* decision holds that the Federal Aviation Act of 1958 preempts, and thus prevents a non-airport proprietor from regulating or controlling aircraft in

flight. Under the circumstances, the enforcement of California's nuisance laws on an airport proprietor is a mere guise to effect indirect "regulation" of aircraft by a non-airport proprietor. This Court's decision in *San Diego Building Trades Council v. Garmon,* and the United States Court of Appeals decision in *Luedtke v. County of Milwaukee,* support the conclusions that (1) the obligation imposed by *Greater Westchester* to pay an award of nuisance damages is a form of regulation; and (2) a state's nuisance statute cannot be invoked to make flights unlawful which are in accordance with federal laws and regulations. Accordingly, these decisions compel a finding that the *Greater Westchester* decision is indeed contrary to the Supreme Court's decision in *Burbank.*

In *Garmon,* the Supreme Court, speaking through Justice Frankfurter, held that because it was arguable that certain union activities involved in that case fell within the ambit of the "concerted activities" or the "unfair labor practice" provisions of the National Labor Relations Act, state jurisdiction to award tort damages was preempted. Concerning this issue, Justice Frankfurter wrote:

> "Nor is it significant that California asserted its power to give damages rather than to enjoin what the Board may restrain though it could not compensate. Our concern is with delimiting areas of conduct which must be free from State regulation if national policy is to be left unhampered. Such regulation can be as effectively exerted through an award of damages as through some form of preventative relief. The obligation to pay compensation can be, and it is designed to be, a potent method of governing conduct and con-

trolling policy. Even the States' salutary effort to redress private wrongs or grant compensation for past harm cannot be exerted to regulate activities that are potentially subject to the exclusive Federal regulatory scheme. (Citations). It may be that an award of damages in a particular situation will not, in fact, conflict with the active assertion of Federal authority. The same may be true of the incidents of a particular State injunction. To sanction either involves a conflict with federal policy in that it involves allowing two lawmaking sources to govern." 359 U.S. at 246, 247.

In *Luedtke,* the United States Court of Appeals for the Seventh Circuit affirmed the District Court which had refused to permit residents who were aggrieved by aircraft noise from seeking, among other things, nuisance damages under Wisconsin State law. The Court of Appeals in *Luedtke* addressed the precise issues now before this Court:

> "Since the federal laws and regulations have preempted local control of aircraft flights, *Burbank, supra,* the defendants may not, to the extent they comply with such federal laws and regulations, be charged with negligence or creating a nuisance. Similarly, §114.04 of the Wisconsin Statutes cannot be invoked to make unlawful flights which are in accordance with federal laws and regulations. If, as the plaintiffs allege, the aircraft flights have resulted in the 'taking' of their property, the plaintiffs have actions at law to recover just compensation from the County. *Griggs, supra* . . . . To the extent that the County may be violating the

> federal laws or regulations, the plaintiffs should . . . exhaust their administrative remedies." 521 F.2d at 391, 392.

In summary, the merging of the concepts of *Burbank, Garmon* and *Luedtke* forge a rule which holds that a cause of action for nuisance damages against an airport proprietor cannot be maintained without evidence of a violation of a federal law or regulation, and then only after the claimant has exhausted all available administrative remedies.[10]

On the other hand, the California Supreme Court in *Greater Westchester* opined that the remedy at California airports is to assess nuisance damages against the airport proprietor.[11] However, the harmonizing of the delicate balance between the "highest degree of safety" and the *effective* control of aircraft noise, with which the Burbank Court was concerned, properly rests with those federal agencies that control aircraft

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[10]This in no way impacts the right of property owners to bring inverse condemnation actions as permitted in *Griggs*. In addition, the damages imposed upon airport proprietors in *Griggs* were constitutionally compelled, while those imposed by *Greater Westchester* were not constitutionally compelled, but rather an intrusion into a field preempted by Congress.

[11]The California Supreme Court tried to distinguish *Garmon* by stating that in that case a remedy existed within the National Labor Relations Act through the adjudication process of the National Labor Relations Board. *Greater Westchester* fails to recognize that the CAB, FAA and EPA offer an adequate remedy as suggested in *Luedtke:* "The regulations of the FAA provide that '[a]ny person who knows of a violation of the Federal Aviation Act of 1958, or of any regulation or order issued under it, may report it to the appropriate personnel of an FAA regional or district office,' and that each such report 'is investigated by FAA personnel.' The results of the investigation are the basis for determining the enforcement action that the FAA will take.' 14 C.F.R. § 13.1. The plaintiffs have failed to indicate why, if the County is violating provisions of the Federal Aviation Act or any regulations issued thereunder, adequate relief is not available through the FAA." 521 F.2d at 391.

flight, certification and scheduling. State legislatures and courts should not, and airport proprietors do not control these areas. Only the FAA, CAB, and Congress working together with nationwide interests in mind, are capable of ensuring a uniform, fair, economical and efficient nationwide aircraft noise abatement program.

3. If Airport Proprietors Are Held Responsible for the Award of Nuisance Damages, They Will Be Forced to Adopt Noise Abatement Rules and Regulations Which Will Conflict With Congressional Intent to Establish a Uniform National Policy to Control Aircraft Noise.

The Court in *Greater Westchester* failed to even discuss the principles enunciated in *Luedtke*.[12] Rather, the Court ignored these principles and took the position that while federal authorities may have encouraged the location and expansion of LAX, the ultimate decisions in this regard were made by the City and, therefore, the City would have to bear the untold cost of paying repetitive nuisance damage awards. The Court then, in effect, proposed three alleged solutions to reduce the impact of having to pay repetitive nuisance awards. None of these are practical remedies:

(1) California Supreme Court's First Proposal—Pursuant to State Law, the City Could Acquire Through Condemnation Proceedings All Noise Impacted Property.

While the condemnation of all residential property impacted by noise from aircraft in flight would reduce noise to the residents (after all they would no longer be living there), there is no evidence to indicate that such a "solution" would be economically feasible. For

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[12]Interestingly, a decision of the California Court of Appeal, *San Diego Unified Port Dist. v. Superior Court*, 67 Cal.App.3d 361 (1977) is in accord with *Luedtke*. By implication, this decision was overruled by *Greater Westchester*.

example, as stated by the FAA, approximately six million people currently reside on 900,000 acres of land exposed to levels of aircraft noise that create a significant annoyance for most residents, and 600,000 people reside within areas that are severely impacted by aircraft noise.[13] If the expenditure of vast sums by airport proprietors were the solution to the nationwide noise problem,[14] there would have been little need for Congress and the FAA to have attempted to resolve the noise problem through retrofitting and other noise abatement legislation and regulation.[15]

(2) California Supreme Court's Second Proposal—the City Could Acquire Air Easements.

While the *Greater Westchester* Court suggests that the acquisition of air easements is a remedy, in reality it is not because, as in the instant case, the acquisition of air easements does not and/or would not insulate the City from nuisance liability. Those persons who were awarded nuisance damages in the *Greater Westchester* case recovered them only *after* they (or the owners of the property in which they resided) were awarded inverse condemnation damages in exchange for air easements.

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[13]FAA, Department of Transportation, Aviation Noise Abatement Policy (November 18, 1976) p. 17.

[14]"The absence of lawsuits in some impacted areas and the recent occurrence of the most significant court precedents cause some observers to consider the pending suits to be merely the 'tip of the iceberg' with substantial potential liabilities yet to arise." FAA, Noise Abatement Policy, *supra,* p. 18.

[15]Indeed, Congress has enacted further legislation to address the aircraft noise problem in H.R. 2440, 96th Cong., 1st Sess. 1979, the "Aviation Safety and Noise Abatement Act of 1979". This Act is awaiting action by the President.

(3) California Supreme Court's Third Proposal—the City Has the Power to "Institute Reasonable Noise Abatement Procedures Which Do Not Conflict With Federal Law."

This solution will cause confusion and adversely impact the national transportation system. If the *Greater Westchester* decision stands, the City and other airport proprietors will be compelled, out of economic necessity, to take steps to minimize environmental impacts and liability exposure by implementing rules and regulations that could be inimical to a national uniform noise policy. Petitioner is not unmindful of the progeny of *Burbank,* which recognize the power of an airport proprietor to impose reasonable and nondiscriminatory airport use restrictions which do not create a burden on interstate commerce.[16] To this end, Petitioner has instituted, after consultation with the FAA as suggested in the Aviation Noise Abatement Policy,[17] a number of noise abatement procedures. However, these noise abatement procedures were not promulgated from a litigation posture with the primary intent of limiting liability. They were drafted in coordination with the FAA with a view towards maintaining "the highest degree of safety" and limiting adverse environmental impacts.

By their very nature, local airport proprietors, while attempting to minimize nuisance liability, would be forced to bow to parochial rather than the more important national interests. Indeed, the *Burbank* Court was appropriately concerned with the possibility of these

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[16]However, no federal decision has actually sanctioned a specific use restriction when contested at a commercial airport. See *British Airways Board v. Port Authority of New York, etc.,* 564 F.2d 1002 (1977); and *British Airways Board v. Port Authority of New York,* 588 F.2d 75 (1977).

[17]FAA, Aviation Noise Abatement Policy, *supra.*

parochial interests limiting the flexibility of the FAA. The Court stated:

> "If we were to uphold the *Burbank* ordinance and a significant number of municipalities followed suit, it is obvious that fractionalized control of the timing of take-offs and landings would severely limit the flexibility of the FAA in controlling air traffic flow. The difficulties of scheduling flights to avoid congestion and the concomitant decrease in safety would be compounded. In 1960 the FAA rejected a proposed restriction on jet operations at Los Angeles airport between 10:00 p.m. and 7:00 a.m. because such restrictions could 'create critically serious problems to all air transportation patterns.' 25 Fed. Reg. 1764-1765." 411 U.S. at 639.[18]

Finally the trial court in *Greater Westchester* found the nuisance to be a continuing one and accordingly ruled that each aggrieved resident could periodically return to court with a new cause of action. The repetitive aspect of such suits is unlike the conclusive nature of an inverse condemnation action in which the airport proprietor receives an interest in the subject property, and litigation ceases. As a result of constant nuisance litigation, airport proprietors will be compelled to institute various alternative noise abatement programs at airports nationwide in an effort to protect themselves from repetitive and unlimited liability. As recognized in *Burbank,* the promulgation of locally crafted noise abatement programs will fractionalize and balkanize a uniform national transportation system,

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[18]There is no reason to believe that a multitude of curfews passed by airport proprietors would be any less burdensome on interstate commerce than a similar curfew imposed by a non-airport proprietor.

contrary to congressional intent. Even assuming an airport proprietor may overcome the monumental legal and technical problems involved in adopting noise abatement procedures that are neither arbitrary nor discriminatory, there is no guarantee that such a result will confer immunity from liability. Consequently, noise aggrieved parties can continue to claim nuisance damages and the viability of a uniform national transportation system will remain in the hands of local courts rather than the FAA.

Conclusion.

The *Greater Westchester* decision misinterprets the relevant case law and impermissibly extends *Griggs v. Allegheny County,* by holding that, in addition to inverse condemnation liability, airport proprietors will now also be liable under State tort law (in this case, "nuisance") for any personal harm or "emotional distress" caused by the operation of aircraft in flight and suffered by persons residing in the vicinity of an airport.

The *Greater Westchester* opinion fails to address and understand the existing legal and institutional scheme of airport and aircraft noise regulation. The result of *Greater Westchester* is a decision which will frustrate the congressionally declared federal policy of a uniform regulatory scheme for airport noise control. It will permit trial courts, on an *ad hoc* basis, to intrude in a preempted area by using their power to award money damages to regulate airport operations for noise abatement purposes. In short, the courts will be regulating airports, airlines and the airline transportation system under the guise of awarding damages.

Burbank is a clear expression by this Court that in order to ensure a uniform approach, Congress has delegated to the FAA and other federal agencies the power to regulate the air transportation industry in order to solve the aircraft noise problem. Clearly, non-airport proprietors may not so regulate. The *Greater Westchester* decision ignores the rationale of *Burbank* and the principle of *Garmon* that the imposition of damages is a form of regulation. Moreover, *Greater Westchester* not only fails to follow but, in effect, ignores the United States Court of Appeals decision in *Luedtke*.

The precepts of *Burbank*, calling for a uniform and exclusive system of federal regulation, are best served by the approach taken in *Luedtke:* a state's nuisance statute cannot be used to make flights unlawful which are in accordance with federal laws and regulations. *Greater Westchester* exacerbates, rather than solves, the aircraft noise problem. It will foster diversity rather than uniformity and divisiveness rather than cooperation.

For the above-stated reasons, the City respectfully requests this Court to grant the requested Petition for Certiorari.

Respectfully submitted,

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APPENDIX A.

Opinion.

Greater Westchester Homeowners Association et al., Plaintiffs and Respondents, v. City of Los Angeles, Defendant and Appellant. [L.A. No. 31105. Dec. 14, 1979.]

SUMMARY

In a nuisance action, the trial court entered judgment against a city and in favor of persons living near the city's large airport for damages for annoyance, inconvenience, discomfort, mental distress, and emotional distress, resulting from noise generated by the arrival and departure of jet aircraft. Plaintiffs were also awarded judgment in inverse condemnation for property damage. Their action had been consolidated with other suits for direct condemnation brought by the city against the owners of other nearby parcels of land. The court also entered a post-judgment order imposing prejudgment interest on all of the awards, both condemnation and nuisance, and assessing attorney fees against the city. (Superior Court of Los Angeles County, No. C 931989, Bernard S. Jefferson, Judge.)

On the city's appeal from the nuisance judgment and the postjudgment order, the Supreme Court affirmed the judgment but reversed the order insofar as it awarded prejudgment interest on the personal injury claims and attorney fees. The cause was remanded for a determination of what attorney fees could be awarded plaintiffs under the principles and limitations expressed in the opinion. The court held that the nuisance claims did not fail by reason of federal preemption of control of noise emitted by flying aircraft. In that connection, the court pointed out that both the federal courts and the Federal Aviation Agency

have refrained from imposing limitations on the rights and obligations of a proprietor-landlord to control aircraft noise levels by nondiscriminatory regulations, and it held that, since the city, not the federal government, chose the location of the airport and elected to expand the facility with knowledge of the residential character of the area, there was no reason in law or policy why the nuisance remedy provided by Civ. Code, § 3479, should not be applied to protect the persons of the owners or occupants of the affected property. The court further held that the city's liability was not precluded by the provision of Civ. Code, § 3482, that nothing done or maintained under the express authority of a statute can be deemed a nuisance, and the fact that the operation of noise generating aircraft is specifically sanctioned by state and federal law. It noted that statutes broadly authorizing or regulating airports and aircraft flights do not create a legislative sanction for their maintenance as a nuisance. Holding that prejudgment interest on the nuisance judgment was improper, the court pointed out that damages for mental and emotional injury are not readily subject to precise calculation and that retroactive interest on such damages adds uncertain conjecture to speculation. Redetermination of the attorney fee award was required, the court held, by reason of failure of the trial court to make the findings necessary for such an award in a direct condemnation proceeding and failure of the order to show whether the fees assessed were actually based on services rendered in establishing those theories of recovery in which the law permits the allowance of fees. (Opinion by Richardson, J., with Tobriner, Mosk, Clark, Manuel and Newman, J.J., concurring. Separate concurring opinion by Bird, C.J.)

COUNSEL

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RICHARDSON, J.—Is a municipality which owns and operates an airport liable on a nuisance theory for personal injuries sustained by nearby residents and caused by noise from aircraft using the facility? We will conclude that it is. The resolution of this issue requires a careful weighing of two conflicting interests and policies. On the one hand, by ancient law, the owners and occupants of land are entitled to the peaceful use, possession, and enjoyment of their property. On the other, the general public has a strong interest in the transportation and related services furnished by commercial aviation. These two interests, the private and the public, are solidly founded in the common law and deeply rooted in established constitutional doctrine. When locked in confrontation, which interest prevails and under what circumstances?

We have looked at the problem before. (*Loma Portal Civic Club v. American Airlines, Inc.* (1964) 61 Cal.2d 582 [39 Cal.Rptr. 708, 394 P.2d 548].) We examine it again in reviewing a judgment entered in the Los Angeles Superior Court in 1976 following a 1975 trial

wherein plaintiffs, multiple homeowners and their families living in the Westchester area adjacent to Los Angeles International Airport (LAX), sought damages from the defendant, City of Los Angeles (City), which owns and operates LAX. The condition of nuisance giving rise to their claim of emotional and mental distress was the noise generated by the arrival and departure of jet aircraft at LAX, the nation's third largest commercial aviation facility.

In 1968 plaintiffs, as owners and occupants of home situated near LAX's two north runways, sued the City in inverse condemnation for property damage and, on a nuisance theory, for personal injuries allegedly caused by noise, smoke, and vibrations emanating from aircraft using LAX. Plaintiffs' action was consolidated with other suits for direct condemnation which were brought by City against the owners of other nearby parcels of land. Trial of the direct condemnation and nuisance actions was bifurcated, and substantial direct and inverse condemnation judgments in favor of plaintiffs were entered and fully satisfied.

The nuisance phase of the case, tried before the court, resulted in findings of fact to the effect that the noise created by jet aircraft using the two north runways of LAX "interfered with person-to-person conversation in the home, . . . [with] normal telephonic communication, with the ability to enjoy the use of the out-of-doors' portion of their property and . . . to hear and enjoy television programs; that such noise caused frequent arousal from sleep and, in some cases, interfered with the ability . . . of school age members of the families to study in their homes." On the basis of the foregoing findings the trial court concluded that plaintiffs had established the existence of an actionable

nuisance giving rise to damages for "annoyance, inconvenience, discomfort, mental distress, and emotional distress," and that a nuisance recovery was independent of plaintiffs' claim for diminution of their property values.

In the nuisance proceeding 41 plaintiffs were awarded damages in the aggregate sum of $86,000 for personal injuries sustained during the period 1967-1975. Thereafter, in a postjudgment order the trial court imposed prejudgment interest on all of the awards, both condemnation and nuisance, and also assessed $200,000 attorney's fees against City which appeals from both the nuisance judgments and the postjudgment order.

Either by way of stipulation or from undisputed evidence, the following significant facts were established: The federal government exercises exclusive control over aircraft "in flight," defined as all movement of the plane from departure to arrival gates; LAX operates in a residential zone under a 1955 conditional use permit from City; City initially located the two north runways with full knowledge that the noise from their use would reach nearby established residences; the north runways were constructed with substantial federal financial assistance under grant agreements between City and the Federal Aviation Administration (FAA); and all commercial aircraft using LAX have federal airworthiness certificates which indicate compliance with federal noise emission standards.

City has consistently argued that plaintiffs' nuisance claim must fail for two reasons. First, the noise in question originates from flying aircraft over which the United States government exercises exclusive dominion and therefore any attempted noise control by an airport

operator is federally preempted. Second, the operation of aircraft being expressly sanctioned by statutory law, any aircraft noise emissions cannot constitute a nuisance because of Civil Code section 3482, which provides: "Nothing which is done or maintained under the express authority of a statute can be deemed a nuisance." We review, and will reject, each of these contentions and will also consider several collateral questions raised by the trial court's postjudgment order.

Preemption

Certain fundamental principles expressed by the United States Supreme Court guide our analysis of the preemption issue. When respective federal and state sovereignties are juxtaposed, "the proper approach is to reconcile 'the operation of both statutory schemes with one another rather than holding one completely ousted.' " (*Merrill Lynch, Pierce, Fenner & Smith v. Ware* (1973) 414 U.S. 117, 127 [38 L.Ed.2d 348, 359, 94 S.Ct. 383].) The courts thereby attempt "the necessary accommodation between local needs and the overriding requirement of freedom for the national commerce. . . ." (*Freeman v. Hewit* (1946) 329 U.S. 249, 253 [91 L.Ed. 265, 272, 67 S.Ct. 274].)

The United States Supreme Court has described, generally, the scope of the preemption doctrine. It has said that federal regulation of an area of commerce may preempt state actions upon the same subject matter if (1) there is an apparent congressional intent to blanket the field, (2) the federal and state schemes directly conflict, or (3) any state intervention would burden or frustrate the full purposes and objectives of Congress. (*Florida Avocado Growers v. Paul* (1963) 373 U.S. 132, 141 [10 L.Ed.2d 248, 256, 83 S.Ct. 1210]; *Rice v. Santa Fe Elevator Corp.* (1947) 331

U.S. 218, 230-231 [91 L.Ed. 1447, 1459-1460, 67 S.Ct. 1146].) The controlling inquiry on the preemption issue is determining whether the state action stands "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." (*Hines v. Davidowitz* (1941) 312 U.S. 52, 57, 67 [85 L.Ed. 581, 586,-587, 61 S.Ct. 399].)

The preemptive intent of Congress may be explicit or implicit, but where the effect of preemption is to impede the exercise of historic state powers the high court has held that the intent must be "clear and manifest." (*Jones v. Rath Packing Co.* (1977) 430 U.S. 519, 525 [51 L.Ed.2d 604, 614, 97 S.Ct. 1305], quoting *Rice, supra,* at p. 230 [91 L.Ed. at p. 1459].) Furthermore, preemption exists only to the extent necessary to serve congressional objectives. (*Merrill Lynch, Pierce, Fenner & Smith v. Ware, supra,* 414 U.S. at p. 127 [38 L.Ed.2d at p. 359].) Additionally, it has long been recognized that state action may also be precluded where it unreasonably affects or discriminates against interstate commerce, or touches upon a field of commerce which requires uniform national regulation. (U.S. Const., art. I, § 8, cl. 3; *A&P Tea Co. v. Cottrell* (1976) 424 U.S. 366, 370-372 [47 L.Ed.2d 55, 60-61, 98 S.Ct. 923]; *Freeman v. Hewit, supra,* 329 U.S. 249, 252 [91 L.Ed. 265, 278-279]; *Cooley v. Board of Wardens of Port of Philadelphia et al.* (1852) 53 U.S. (12 How.) 298, 339 [13 L.Ed. 996].)

Consistent with the foregoing general principles and with specific application to aviation, we have previously acknowledged that commercial flights which are conducted in strict compliance with federal regulations may not be enjoined as nuisances, both because of

the continuing public interest in air transportation, and because of the likelihood of direct conflict with federal law. (*Loma Portal Civic Club v. American Airlines, Inc., supra,* 61 Cal.2d 582, 591.) In so holding, however, we expressly cautioned that our decision did not determine the "rights of landowners who suffer from airplane annoyances to seek damages from the owners or operators of aircraft *or to seek compensation from the owner or operator of an airport.*" (*Ibid.,* italics added.) Preemption, we observed, did not operate per se to preclude the enforcement of private state remedies for aircraft noise damage, and only a "compelling federal interest" would support a finding that Congress intended to nullify state-created rights. (*Id.,* at p. 592.)

Is there a "compelling federal interest" which precludes state imposition of nuisance liability upon the proprietor of an airport? If so, it will be revealed in current statutory and decisional law which we examine.

The Federal Aviation Act of 1958, as amended (Act) (49 U.S.C.A. § 1301 et seq.; all statutory references are to 49 U.S.C.A. unless otherwise cited) grants the FAA exclusive control over aircraft takeoffs, landings, and air navigation. (§ 1348(c); see 14 C.F.R. pts. 1-171.) Acting through the FAA, the federal government also provides construction grants for needed airports under agreements which require extensive federal supervision of their location, layout, design, and environmental compatibility. (§§ 1716(c)-(e), 1718 (a)(3), (a)(4), 1719.) Section 1718(a)(1) requires that airports so subsidized must be available for public use on "fair and reasonable terms and without unjust discrimination, . . ." The federal government has also

been involved in aircraft noise control. Since 1968 the FAA and, more recently, the Environmental Protection Agency (EPA) have been under congressional mandate to establish maximum noise emission levels for operating aircraft (§ 1431(b)(1)); and preliminary federal noise control standards have been in effect since 1969 (14 C.F.R. § 36.1 et seq.).

Shortly after the adoption of the Act the Supreme Court majority in *Griggs v. Allegheny County* (1962) 369 U.S. 84 [7 L.Ed.2d 585, 82 S.Ct. 531], reaffirmed the obligation of a public entity to compensate, through the inverse condemnation remedy, for *property* "taken" when excessive airport noise prevents the peaceful use and occupancy of residential land. The rights of property owners in this situation were fully respected. (See also *Aaron v. City of Los Angeles* (1974) 40 Cal.App. 3d 471, 483-486 [115 Cal.Rptr. 162], *cert. den.* (1975) 419 U.S. 1122 [42 L.Ed.2d 822, 95 S.Ct. 806].)

Subsequently, however, when a preemption issue within the context of assertion of the local police power, the high court majority held that the Act, as amended by 1968 and 1972 federal noise control laws had completely preempted local regulation of "aircraft in flight" for the purpose of aviation noise abatement. (*City of Burbank v. Lockheed Air Terminal* (1973) 411 U.S. 624 [36 L.Ed.2d 547, 93 S.Ct. 1854].) Interpreting the foregoing Act the high court, in invalidating an ordinance of the City of Burbank which imposed a night curfew on jet flights at the privately owned Hollywood-Burbank Airport, reasoned that the federal legislation demonstrated an implicit congressional intent to give to the FAA and EPA full control over aircraft flight and aviation noise.

The *Burbank* court concluded that the widespread imposition of local curfews would frustrate flight scheduling and navigational patterns nationwide, thus hindering commerce, aviation safety, and the general FAA management of the national air traffic network (pp. 637-640 [36 L.Ed. 2d pp. 555-557].)

While thus precluding local regulation of aircraft noise under the police power, the *Burbank* court expressly refrained from imposing similar limitations on the rights and obligations of a *proprietor-landlord* to control aircraft noise levels. The high tribunal carefully noted that congressional committees which were considering the 1968 and 1972 laws had affirmed the Department of Transportation/FAA view that federal law did not preempt the exercise of reasonable, non-discriminatory proprietary control over land use planning, design and location of runways, aircraft noise limits, and curfews. Specially referring to a letter from the Secretary of Transportation to a senate subcommittee which was considering the 1968 noise control legislation, the court said: "The letter from the Secretary of Transportation also expressed the view that 'the proposed legislation will not affect the rights of a State or local public agency, *as the proprietor of an airport* [italics in original], from issuing regulations or establishing requirements as to the permissible level of noise which can be created by aircraft using the airport. Airport owners *acting as proprietors* [italics in original] can presently deny the use of their airports to aircraft on the basis of noise considerations so long as such exclusion is nondiscriminatory.' . . . [¶] [W]e are concerned here not with an ordinance imposed by the City of Burbank as 'proprietor' of the airport, but with the exercise of police power. . . . Thus,

authority that a municipality may have as a landlord is not necessarily congruent with its police power. We do not consider here what limits, if any, apply to a municipality *as a proprietor* [italics added]." (Pp. 635-636, fn. 14 [36 L.Ed.2d at p. 555]; see Sen.Rep. No. 1353, 90th Cong., 2d Ses. (1968), 1968 U.S. Code Cong. & Admin. News pp. 2688, 2693; cf. Sen.Rep. No. 92-1160 2d Sess. (1972), 1972 U.S. Code Cong. & Admin. News, pp. 4655, 4663.)

The careful distinction drawn by the Supreme Court between proprietary duties and police power regulation is supported administratively by the FAA, which both before and after *Burbank* has publicly emphasized the local airport operator's responsibilities for noise control. (E.g., FAA, Dept. of Transportation, Aviation Noise Abatement Policy (Nov. 1976) at pp. 5, 32-34; 14 C.F.R. §§ 36.9, 399.110(f); 34 Fed.Reg. 18355 (1969).)

In the wake of *Burbank,* however, there has been no appellate agreement on the scope of the so-called "proprietor exception" to the federal preemption rule and its effect on the tortious liability of airports. Some federal courts have held that the effect of *Burbank* is to bar airport proprietors from restricting the patterns, frequency, and scheduling of flights, and to prohibit any limitation on the permissible types of aircraft. (*Luedtke v. County of Milwaukee* (7th Cir. 1975) 521 F.2d 387, 390-391 [absolving proprietor of nuisance liability for airport noise]; *County of Cook v. Priester* (1974) 22 Ill.App.3d 964 [318 N.E.2d 327, 330-332].) Other courts, while agreeing that proprietors may not regulate *aircraft* have held that airport operators do retain responsibility for the proper construction, operation, and maintenance of ground facil-

ities, and for land use planning designed to minimize the effects of noise. (E.g., *Air Transport Association of America v. Crotti* (N.D.Cal. 1975) 389 F.Supp. 58, 63-64.)

Several federal courts, supporting the FAA position, have interpreted *Burbank* as recognizing the power of a proprietor to impose airport use restrictions to the extent that they are reasonable and nondiscriminatory. In two cases involving flights of the Concorde supersonic transport (SST) airplane the second circuit concluded that New York City's John F. Kennedy Airport may impose reasonable noise limitations, the effects of which might preclude the commencement of SST service. (*British Airways v. Port Authority of New York, Etc.* (2d Cir. 1977) 564 F.2d 1002, 1011; *British Airways Bd. v. Port Authority of New York* (2d Cir. 1977) 558 F.2d 75, 82-85.) A lower federal court has upheld the right of a noncommercial municipal airport to impose a *Burbank*-type curfew. (*National Aviation v. City of Hayward, Cal.* (N.D.Cal. 1976) 418 F.Supp. 417, 424-425.)

In *San Diego Unified Port Dist. v. Superior Court* (1977) 67 Cal.App.3d 361 [136 Cal.Rptr. 557] (cert. den. *sub. nom. Britt et al. v. San Diego Unified Port District et al.*, 434 U.S. 859 [54 L.Ed.2d 132, 98 S.Ct. 184]), the Court of Appeal, while concluding that federal regulation of aviation and aircraft noise preempted the proprietor's control of "aircraft in flight," nonetheless held that a proprietor could be responsible in tort for the noise consequences of its land use planning decisions and improper use and maintenance of its ground facilities (pp. 376-378).

As the *Burbank* court suggests, considering the inverse condemnation burden imposed upon airport own-

ers by *Griggs,* Congress apparently intended to preserve the principle of substantial proprietary control over airport planning, design, and use. (See Comment, *Aircraft Noise: Federal Pre-emption of Local Control, Concorde and Other Recent Cases* (1977) 43 J. Air L. & Com. 753, 777; see also, Airline Deregulation Act of 1978, Pub.L. No. 95-504, 49 U.S.C.A. §1305 (a)(1).) Nonetheless, the related congressional enactments contemplate very considerable federal involvement in the planning and operation of airports. The FAA has apparently invoked both contractual and regulatory authority on several occasions to oppose unilateral proprietor use restrictions. (See EPA, Legal and Institutional Analysis of Aircraft Noise and Apportionment of Authority Between Fed., State, and Local Governments (July 1973) at pp. 4/25-4/28.) Furthermore, the *Burbank* opinion strongly suggests that any local noise or use restrictions, by whomever imposed, which substantially upset current air schedules or prevented the use of commercial aircraft which were currently operational would burden to an unacceptable degree both federal aviation policy and interstate commerce. (See Note, *Aircraft Noise Abatement: Is There Room For Local Regulation?* (1975) 60 Cornell L. Rev. 269, 288-293; Note, *Shifting Aircraft Noise Liability to the Federal Government* (1975) 61 Va.L.Rev. 1299, 1333-1335.)

On the other hand, the citizen's rights to the full use, possession, and enjoyment of his property are given a protected status under the law. Since 1873 our statutes have defined an actionable nuisance as "Anything which is injurious to health, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfort-

able enjoyment of life or property . . ." (Civ. Code, § 3479.) The foregoing authorities recognize that a property owner has an inverse condemnation remedy, constitutionally founded, against the proprietor of an airport for *property* damage or loss caused by noise generated at the facility. We discern no reason either in law or policy why the common law and statutory remedy of nuisance as above defined should not under similar circumstances equally protect the *person* of the owner or the occupant.

We find significance in the depth and continuous nature of City's involvement in the creation and maintenance of the nuisance in question. City concedes that it, and not the federal government, decided to build and then to expand the airport in the immediate vicinity of a residential area. It is undeniable that City chose the particular location and direction of the airport runways. It approved their usage by jet aircraft. It entered into service agreements with commercial air carriers all with full and prior knowledge of the potential noise impact. (See *City of Los Angeles v. Japan Air Lines Co., Ltd.* (1974) 41 Cal.App.3d 416, 419-422 [116 Cal.Rptr. 69].)

Admittedly, some of the foregoing actions by City followed federal advice, approval, and perhaps even encouragement. Nonetheless, City chose, and was not forced by anyone, to develop LAX in its particular location. City voluntarily elected to expand the facility, with foreknowledge of the preexisting nature and usage of the surrounding area. There is no evidence before us that City opposed the current level of federally approved jet service at LAX. Fair inferences are to the contrary. (*Id.*, at pp. 422-423.)

Nor has City lacked the means to meet the obligations herein imposed. Since at least 1965, public entities have had statutory power to condemn "aircraft noise . . . easements," and to secure, in appropriate quantities, land which might otherwise be the subject of noise damage actions. (Code Civ. Proc., § 1240.110, subd. (a) (former § 1239.3); see *City of Oakland v. Nutter* (1970) 13 Cal.App.3d 752, 772 [92 Cal. Rptr. 347].) This power and City's responsibility to exercise it in such a manner as to minimize noise at LAX have been publicly acknowledged by airport management. Aircraft landing fees have been established to assist in meeting the costs of land acquisition. (*Japan Air Lines, supra,* at p. 423.) With particular reference to the matter before us, plaintiff's acoustician testified at trial that as early as 1967 he had suggested to LAX officials the economic feasibility of constructing ground barriers to deflect and diminish LAX noise. The soundproofing of adjacent structures and restrictions on noise generated by static engine tests were additional proposed alternatives. Accordingly, City cannot fairly argue that federal law has rendered City powerless to prevent or reduce the damages of which plaintiffs complain.

Pointing to the depth of federal involvement in air navigation and noise abatement and by analogy with a series of United States Supreme Court holdings in the field of labor relations following *San Diego Unions v. Garmon* (1959) 359 U.S. 236 [3 L.Ed.2d 775, 79 S.Ct. 773], City and its amici urge preclusion of any state recognized tort liability for airport noise. In *Garmon,* state courts were held powerless to examine conduct which was either protected or prohibited by

the provisions of the National Labor Relations Act (NLRA). However, the *Garmon* principles have been held by the high court itself to be limited by the unique nature of the NLRA which empowers the National Labor Relations Board (NLRB) to devlop a uniform national labor policy affecting labor-management disputes within NLRA's scope. (*Sears, Roebuck & Co. v. Carpenters* (1978) 436 U.S. 180, 194-198 [56 L.Ed.2d 209, 223-226, 98 S.Ct. 1745]; *Machinists v. Wisconsin Emp. Rel. Comm'n* (1976) 427 U.S. 132, 138-139 [49 L.Ed.2d 396, 402-403, 96 S.Ct. 2548]; *Garmon, supra,* at pp. 239-246 [3 L.Ed.2d at pp. 779-784].) Even in labor relations cases, however, *Garmon* has not been interpreted as precluding resolution by the state of disputes which the NRLB could not have resolved, or of disputes in which a state's significant interest in protecting its citizens outweighed federal labor considerations. (*Sears, supra,* at pp. 197-198 [56 L.Ed.2d at pp. 225-226]; *Farmer v. Carpenters* (1977) 430 U.S. 290, 298-301 [51 L.Ed.2d 338, 348-351, 97 S.Ct. 1056]; *Garmon, supra,* at pp. 243-244 [3 L.Ed.2d at pp. 781-783].)

Our examination of the Act reveals nothing to suggest that FAA possesses any adjudicatory power over noise disputes between airport owners or proprietors, and property owners or occupants. Nor do any federal aviation laws provide for relief to noise victims. On the contrary, the Act specifically provides that its terms shall not abridge "remedies now existing at common law or by statute, . . ." (§ 1506.) This would seem to preserve the validity of preexisting nuisance causes of action. Recognizing as we do the state's traditional interest in compensating its citizens for damages incurred, whether to person or property, and no reason

appearing for extending the *Garmon* doctrine to the airport noise situation, we decline to do so.

Finally, we are not persuaded that preemption is mandated because recognition of a state nuisance remedy would impermissibly hinder commerce or conflict with federal policy. We cannot assume that the imposition of liability on a proprietor for personal injury would burden commerce to an appreciably greater degree than that represented by the well accepted, indeed constitutionally compelled, exposure of the proprietor to property damage claims. While it is true that the probable number of claimants will increase and the nature of the claims enlarge, we discern no basis for any reasoned distinction between claims for property damage and personal injury arising from the same activity and cause.

We therefore hold that the claims for personal injuries founded upon nuisance have not been federally preempted.

Civil Code Section 3482

City contends that LAX cannot be liable for nuisance because the noise generating activity complained of is specifically sanctioned by statutes, federal and state, Particularly, City relies upon Civil Code section 3482.

We have consistently applied a narrow construction to section 3482 and to the principle therein embodied. Thus, a number of years ago we observed, " 'A statutory sanction cannot be pleaded in justification of acts which by the general rules of law constitute a nuisance, unless the acts complained of are authorized by the express terms of the statute under which the justification is made, or by the plainest and most necessary implication from the powers expressly conferred, so that it can be fairly stated that the legislature

contemplated the doing of the very act which occasions the injury." (*Hassell v. San Francisco* (1938) 11 Cal. 2d 168, 171 [78 P.2d 1021], quoting 46 C.J., Nuisances, § 41, p. 674; see also *Varjabedian v. City of Madera* (1977) 20 Cal.3d 285, 291 [142 Cal.Rptr. 429, 572 P.2d 43]; *Nestle v. City of Santa Monica* (1972) 6 Cal.3d 920, 938, fn. 16 [101 Cal.Rptr. 568, 496 P.2d 480].)

As we recently confirmed in *Varjabedian,* "A requirement of 'express' authorization embodied in the statute itself insures that an unequivocal legislative intent to sanction a nuisance will be effectuated, while avoiding the uncertainty that would result were every generally worded statute a source of undetermined immunity from nuisance liability." (P. 291.) In a similarly restricted fashion an appellate court has noted that "Accordingly, although an activity authorized by statute cannot be a nuisance, the *manner* in which the activity is performed may constitute a nuisance." (*Venuto v. Owens-Corning Fiberglas Corp.* (1971) 22 Cal.App.3d 116, 129 [99 Cal.Rptr. 350].)

The planning, location, construction, and operation of airports and the specifications and flight procedures of the aircraft using them are closely regulated by both federal and state law. Both levels of government are pledged, generally, to foster the growth of civil aviation and, specifically, the development of needed air terminals. However, we observed in *Nestle v. City of Santa Monica, supra,* that statutes which broadly authorize or regulate airports and aircraft flights do not create a legislative sanction for their maintenance as a nuisance. (6 Cal.3d at p. 938, fn. 16.)

The argument is made that because aviation and noise are necessarily inseparable, governmental approval

and encouragement of aviation activity necessarily implies legislative approval of aviation noise which results in interference with neighboring land uses. We disagree. Both federal and state authorities have attempted vigorously to abate aircraft and airport noise. (Pub. Util. Code, §§ 21002, subd. (g), 21669-21669.5.) In addition, as previously noted, the California Legislature has granted airports express and expanded condemnation and compensation authority to reduce and minimize the effects of noise on the private use and enjoyment of neighboring land. (Code Civ. Proc., § 1240.110, *supra,* Pub. Util. Code, §§ 21690.5 et seq., 21690.20 et seq.) Reasonably construed, the foregoing legislation preserves both the authority and responsibility of an airport proprietor to acquire adequate noise easements and to institute reasonable noise abatement procedures which do not conflict with federal law.

City's reliance on *Lombardy v. Peter Kiewit Sons' Co.* (1968) 266 Cal.App.2d 599 [72 Cal.Rptr. 240], is unpersuasive. The *Lombardy* court held that section 3282 barred any nuisance recovery for damages incurred by reason of a vehicular freeway constructed under authority of the Streets and Highways Code (p. 605). While we did not reach the question of the continued validity of *Lombardy* in *Varjabedian, supra* (20 Cal.3d at pp. 291-292, fn. 6), we did reiterate that our *Hassell* test of legislative authorization required a "particularized" inquiry into each statute to ascertain whether there existed a legislative intent to sanction a nuisance. Considered in the airport noise context, the *Lombardy* analysis of the laws therein presented does not persuade us that the Legislature intended that immunity from traditional nuisance liability is statutorily conferred. To the contrary, we hold

that no such immunity derives from section 3482 or any other related federal or state statute.

Prejudgment Interest

City contends that the trial court improperly awarded prejudgment interest under Civil Code section 3288 for the personal injuries and emotional distress sustained by reason of the airport noise. We agree with the contention.

Section 3288 recites, "In an action for the breach of an obligation not arising from contract, and in every case of oppression, fraud, or malice, interest may be given, in the discretion of the jury." We have recently affirmed that, unlike Civil Code section 3287, which relates to liquidated and contractual claims, section 3288 permits discretionary prejudgment interest for unliquidated tort claims. (*Bullis v. Security Pac. Nat. Bank* (1978) 21 Cal.3d 801, 814-815 [148 Cal. Rptr. 22, 582 P.2d 109].) In *Bullis,* we characterized prejudgment interest as "awarded to compensate a party for the loss of his or her *property.*" (*Id.,* at p. 815, italics added; see also *Nordahl v. Department of Real Estate* (1975) 48 Cal.App.3d 657, 665 [121 Cal.Rptr. 794] ["deprived of the use of his money or property"].) The award of such interest represents the accretion of wealth which money or particular property could have produced during a period of loss. Using recognized and established techniques a fact finder can usually compute with fair accuracy the interest on a specific sum of money, or on property subject to specific valuation. Furthermore, the date of loss of the property is usually ascertainable, thus permitting an accurate interest computation. (*Bullis, supra,* at p. 815.)

However, damages for the intangible, noneconomic aspects of mental and emotional injury are of a different

nature. They are inherently non-pecuniary, unliquidated and not readily subject to precise calculation. The amount of such damages is necessarily left to the subjective discretion of the trier of fact. Retroactive interest on such damages adds uncertain conjecture to speculation. Moreover where, as here, the injury was of a continuing nature, it is particularly difficult to determine when any particular increment of intangible loss arose. Acknowledging the problem, the trial court arbitrarily resorted to an "averaging" method applied to both the amount and duration of the loss. In our view this process was impermissibly speculative.

Furthermore, a fact finder in assessing a claim of general damages for physical, mental and emotional suffering, possesses full authority to consider the duration of the alleged suffering. Accordingly, the disallowance of any interest on such a claim does not deprive the claimant of compensation for an element of actual damage. To the contrary, its allowance, in fact, may in a given case create a double recovery.

For the foregoing reasons, some respected commentators have disapproved the allowance of prejudgment interest on a claim of general damages for suffering. (E.g., McCormick, Damages (1935) § 57, p. 226; Comment, *Interest as Damages in California* (1958) 5 UCLA L.Rev. 262, 264, 271; see also Rest., Torts, § 913(2).) No California courts have previously extended section 3288 to general damages for personal injury, and the prevailing common law view in other jurisdictions appears to be that prejudgment interest is inappropriate in such cases. (See authorities collected in 22 Am.Jur.2d (1965) Damages, § 191, p. 269, fn. 8.) We conclude that the better rule disallows prejudgment interest on the nuisance claim.

Counsel Fees

The trial court awarded plaintiffs' counsel attorney's fees in the amount of $200,000. In making the award the court did not segregate the fees on the basis of any particular allocation to the direct condemnation, inverse condemnation and nuisance-personal injury phases of the suit. This is necessary. Attorney's fees may be granted in direct condemnation proceedings (Code Civ. Proc., §§ 1235.140, subd. (b) (former § 1255a, subd. (c)), 1268.710 (former § 1255)), but only when and if the trial court makes those statutory findings required by Code of Civil Procedure section 1250.410 (former § 1249.3). The trial court made no such findings. Attorney's fees are clearly recoverable and appropriate with respect to inverse condemnation. (*Id.*, § 1036 (former § 1246.3).) The parties agree that counsel fees may not be assessed with respect to the personal injury claim. (*Id.*, § 1021; *Davis v. Air Technical Industries, Inc.* (1978) 22 Cal.3d 1, 6 [148 Cal.Rptr. 419, 582 P.2d 1010].)

The trial court's award of counsel fees substantially discounted counsel's original claim of $352,000. We express no opinion as to the propriety of the amount of fees awarded by the trial court, leaving the determination to its sound discretion. We are unable to ascertain, however, whether the fees which were assessed were actually based upon services rendered to plaintiffs in establishing those theories of recovery in which the law permits the allowance of fees. We must accordingly remand the case for an appropriate allocation of attorney's fees, limiting their award to recovery under those causes of action which statutorily permit their assessment.

The judgment appealed from is affirmed. The order after judgment is reversed insofar as it awards (1) prejudgment interest on the personal injury claims, and (2) attorney's fees, and is otherwise affirmed. The cause is remanded to the trial court for further proceedings for the purpose of determining what attorney's fees should be awarded plaintiffs under the principles and limitations herein expressed. Plaintiffs shall recover their costs on appeal. (Cal. Rules of Court, rule 26(a).)

Tobriner, J., Mosk, J., Clark, J., Manuel, J., and Newman, J., concurred.

BIRD, C. J., Concurring.—I write separately since the majority's preemption analysis contains a significant flaw which may spawn unnecessary future litigation.

The majority opinion holds that a tort action may be brought against airport proprietors for personal injuries resulting from airport noise since federal law has not preempted this area. The fundamental weakness of the opinion is not its result but its reasoning. Although the opinion discusses congressional intent, the opinion ultimately supports its holding with a misplaced reliance on inverse condemnation law. (Maj. opn., *ante*, at p. 98.) In an inverse condemnation action, the property owner alleges that his constitutional rights were violated because his property was taken without just compensation. Preemption is *not* in issue since federal regulations cannot preempt constitutionally protected rights.

Any preemption analysis should place reliance upon, and not merely give lip service to, congressional intent. The determinative inquiry is whether either (1) the federal regulation is so extensive that it evidences a

congressional design to preempt the field or (2) there is actual conflict betwen the propsoed local action and the federal regulation such that the two schemes of regulation cannot both stand. (*Florida Avocado Growers v. Paul* (1963) 373 U.S. 132, 141 [10 L.Ed. 2d 248, 256, 83 S.Ct. 1210].)

The related congressional enactments contemplate considerable federal involvement in the construction, supervision and operation of jet aircraft and the airports which serve them. The Federal Aviation Act provides that, "[t]he United States of America is declared to possess and exercise complete and exclusive national sovereignty in the airspace of the United States. . . ." (49 U.S.C. § 1508(a).)[1] This act authorizes the administrator of the Federal Aviation Administration (FAA) to develop rules and procedures for the safe and efficient use of navigable airspace as well as the certification of aircraft, airmen, commercial air carriers and airports. (§§ 1348(c), 1371, 1429, 1430, 1432.) Under these statutes, the FAA is required to regulate the flight patterns of civil aircraft including the procedures and routes used in takeoff and landing. (14 C.F.R. pts. 1-171.)

There are specific provisions which relate to noise control. For example, the FAA, after consultation with the Environmental Protection Agency, is required to provide "for the control and abatement of aircraft noise and sonic boom, including the application of such standards and regulations in the issuance, amendment, modification, suspension, or revocation of any certificate authorized by this subchapter." (§ 1431(b)(1).) If federal subsidies are being received, the FAA

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[1]All statutory references are to title 49 of the United States Code, unless otherwise indicated.

may also exert control over the planning, design, location, construction, layout, environmental compatibility and intergovernmental coordination of airport projects. (§§ 1716(c)-(e), 1718(a)(3), 1718(a)(4), 1719.)

While federal regulation is extensive, both the legislative and executive branches have publicly emphasized local airport operators' responsibility for controlling airport noise through reasonable nondiscriminatory regulation. For example, the Senate Commece Committee Report which discussed the anticipated effects of the Federal Aviation Act, quoted with approval the following language of the Secretary of Transportation: "[t]he proposed legislation will not affect the rights of a state or local public agency, as the proprietor of an airport, from issuing regulations or establishing requirements as to the permissible level of noise which can be created by aircraft using the airport. Airport owners acting as proprietors can presently deny the use of their airports to aircraft on the basis of noise considerations so long as such exclusion is nondiscriminatory." (Sen. Rep. No. 1353, 90th Cong., 2d Sess.; 1968 U.S. Code Cong. & Admin. News, pp. 2688, 2694.)

Similarly, the House Interstate and Foreign Commerce Committee Report indicated that the Congress did not intend to preempt this area. "Rather, the committee expects manufacturers, air carriers, all other segments of the aviation community, the State and local civic and governmental entities to continue and increase their contributions toward the common goal of quiet." (H.R.Rep. No. 1463, 90th Cong., 2d Sess., p. 4.) In *British Airways Bd. v. Port Authority of New York* (2d Cir. 1977) 558 F.2d 75, 82, the United States Department of Justice filed an amicus brief in which it "denied that existing legislation

authorized the Executive under any circumstances to preempt airport proprietors from promulgating their own noise regulations." Finally, the FAA and the United States Department of Transportation, in a statement of Aviation Noise Abatement Policy, said: "Airport proprietors are primarily responsible for planning and implementing action designed to reduce the effect of noise on residents of the surrounding area. Such actions include optimal site location, improvements in airport design, noise abatement ground procedures, land acquisition, and restrictions on airport use that do not unjustly discriminate against any user, impede the federal interest in safety and management of the air navigation system, or unreasonably interfere with interstate or foreign commerce." (FAA, Dept. of Transportation, Aviation Noise Abatement Policy (Nov. 18, 1976) p. 5.) "Our concept of the legal framework underlying this policy statement is that proprietors retain the flexibility to impose such restrictions if they do not violate any Constitutional proscription. We have been urged to undertake—and have considered carefully and rejected—full and complete federal preemption of the field of aviation noise abatement. In our judgment the control and reduction of airport noise must remain a shared responsibility among airport proprietors, users, and governments." (*Id.*, at p. 34.)

The Supreme Court recognized this limitation of federal control in *City of Burbank v. Lockheed Air Terminal* (1973) 411 U.S. 624 [36 L.Ed.2d 547, 93 S.Ct. 1854]. A municipality acting under its *police power*, was held to have acted improperly in enacting nighttime jet curfews of flights emanating from or landing at a privately owned airport since this type of local regulation was held to be federally preempted.

The court reasoned that widespread imposition of local curfews could frustrate flight scheduling and navigational patterns nationwide, thus burdening interstate commerce, aviation safety, and the FAA's management of the air traffic network. (*Id.*, at pp. 639-640 [36 L.Ed.2d at pp. 556-557].) Nevertheless, the Supreme Court explicitly stated that their decision did not decide in any way the rights of airport operators, acting in their *proprietary* capacity, in regulating airport use to abate noise. (*Id.*, at p. 635, fn. 14 [36 L.Ed.2d at p. 555].)

Although post-*Burbank* judicial decisions have disagreed on the scope of the so-called "proprietor exception," those decisions make clear that not all proprietor regulations have been federally preempted. Several cases have recognized a proprietor's power to impose airport use restrictions where reasonable and nondiscriminatory. E.g., *British Airways Bd. v. Port Authority of New York* (2d Cir. 1977) 564 F.2d 1002, 1011; *British Airways Bd. v. Port Authority, supra,* 558 F.2d at pp. 82-85.) Another federal case upheld the right of a noncommercial airport to impose a *Burbank*-style curfew. (*National Aviation v. City of Hayward, Cal.* (N.D.Cal. 1976) 418 F.Supp. 417, 424-425.) Virtually all the cases, including those decisions which found proprietor control of aircraft in flight federally preempted, agree that proprietor control over management of *ground facilities* has not been federally preempted. (E.g., *San Diego Unified Port Dist. v. Superior Court* (1977) 67 Cal.App.3d 361 [136 Cal.Rptr. 557]; *Air Transport Association of America v. Crotti* (N.D. Cal. 1975) 389 F.Supp. 58, 63-64.)

The majority opinion details the activities that were available to the City of Los Angeles (City) to miti-

gate the harm resulting from its extensive involvement in the creation and maintenance of this particular nuisance. (Maj. opn., *ante,* at pp. 98, 99.) For example, the City could have chosen different locations for its runways. It could have acquired buffer land by its statutory condemnation power. Ground barriers could have been constructed to deflect and diminish Los Angeles International Airport noise and adjacent structures could have been sound-proofed.

It is clear that the pertinent congressional enactments contemplate considerable federal involvement in the planning and operation of airports. The *Burbank* opinion (411 U.S. 624 [36 L.Ed.2d 54]) suggests that any noise or use restriction which substantially interferes with the federal regulatory scheme would burden interstate commerce and improperly limit the FAA's authority. However, it is also clear that substantial non-preempted regulatory activity could have been undertaken by the City.[2] This failure of the City to act is the correct basis for imposing nuisance liability. It is *not,* as the majority appear to argue, the treatment accorded property owners in inverse condemnation

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[2]Plaintiffs argue that the imposition of nuisance liability by the court for failure to undertake nonpreempted activity would itself constitute preempted regulation. This argument is untenable. Imposition of nuisance liability does not constitute regulation. The court is not advising the City on how to run its airport. It is merely making certain that the City remains responsible for the true costs associated with the airport's operation. The City retains the power to take any action it pleases. The City may acquire buffer land, soundproof the airport's runways, or continue its airport's operations and pay its neighbors for any damage that accrues. Moreover, plaintiffs' position ignores the express language of 49 United States Code section 1506 that "[n]othing contained in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies."

cases. The majority's analogy to inverse condemnation law is not only unnecessary, it is inapposite as well.

With respect to the majority's treatment of the prejudgment interest award, it is important to underscore that the award is invalid only to the extent it represents interest on "the intangible noneconomic aspects of mental and emotional injury' claimed by plaintiffs. (Maj. opn., *ante,* at p. 103.) If plaintiffs allege specific damage that is supported by tangible evidence, prejudgment interest may properly be awarded under Civil Code section 3288. Clearly, there can be no basis in law or reason for distinguishing between awarding interest on an unauthorized withdrawal from a bank checking account, as this court did in *Bullis v. Security Pac. Nat. Bank* (1978) 21 Cal.3d 801, 814-815 [148 Cal.Rptr. 22, 582, P.2d 109], and awarding interest on a paid medical bill arising out of a defendant's tortious conduct. In both cases, the plaintiff has been deprived of the use of his money and "the accretion of wealth which [the] money . . . could have produced during [the] period of loss." (Maj. opn., *ante,* at p. 103.)

APPENDIX B.

Opinion of the Court of Appeal.

CERTIFIED FOR PUBLICATION

In the Court of Appeal of the State of California, Second Appellate District, Division Three.

Greater Westchester Homeowners Association, etc., et al., Plaintiffs and Respondents, v. City of Los Angeles, etc., et al., Defendants and Appellants. 2D Civ. No. 51698 (Super.Ct. No. C 931 989).

Filed: Feb. 28, 1979.

APPEAL from a judgment and an order of the Superior Court of Los Angeles County. Bernard S. Jefferson, Judge. The judgment is affirmed; the order after judgment is affirmed in part and reversed in part.

Burt Pines, City Attorney, Lawrence M. Nagin and James H. Pearson, Assistant City Attorneys, for Defendants and Appellants.

Fadem, Berger & Norton and Michael M. Berger for Plaintiffs and Respondents.

Defendant, City of Los Angeles, appeals from a judgment awarding 41 specified neighboring homeowners and various members of their families a total of $86,800 in principal damages for essentially the mental and emotional distress caused them by the nuisance of excessive noise emanating from jet aircraft using the two north runways of the municipally-owned Los Angeles International Airport (LAX), and from the order after judgment for prejudgment interest in the

total amount of $31,671.95, and for $200,000 in attorneys' fees.[1]

The City challenges the propriety of the judgment on only two grounds. The first of these is that the federal government has totally preempted the regulation of jet aircraft noise and the second is that the complained of use of jet aircraft on the two north runways of LAX is an activity done and maintained under the express authority of various statutes, etc., or their equivalent, and therefore the noise resulting from such use cannot, under Civil Code section 3482, be deemed a nuisance.

We believe both of these grounds to be without merit and will, therefore, affirm the judgment under appeal. We will, however, remand the order after judgment for the sole purpose of further proceedings to determine what attorneys' fees should be awarded plaintiffs' counsel.

DISCUSSION

I.

The Cause of Action for Nuisance herein is not Federally Preempted

The City contends to the contrary on the basis of *San Diego Unified Port Dist. v. Superior Court*

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[1]The dispute over attorneys' fees includes the question whether the compensated services of plaintiffs' counsel were rendered, at least in part, in the nuisance phase of the consolidated action as opposed to the direct condemnation portion thereof and the inverse condemnation part.

The City does not challenge on appeal any of the other costs awarded plaintiffs' counsel, nor do they challenge the sufficiency of the evidence in support of the trial court's findings and conclusions regarding the existence of the nuisance.

(1977) 67 Cal.App.3d 361, a decision of our San Diego District. In this case our Supreme Court denied hearing in April 1977 and the United States Supreme Court denied certiorari in October 1977. (*Id.* at p. 378.) Neither of these denials of review necessarily indicates, however, approval of this decision by the two high courts. (See *People v. Triggs* (1973) 8 Cal.3d 884, 891; *Maryland v. Baltimore Radio Show* (1950) 338 U.S. 912, 919 [94 L.Ed. 562, 566].)

Our San Diego District concluded that nearby homeowners could not recover tort damages from an airport proprietor for harm caused by the noise of aircraft in flight because allowing such recovery "would permit local liability for conduct within exclusive federal control." (*San Diego Unified Port Dist. v. Superior Court, supra,* 67 Cal.App.3d at pp. 363, 376-378.) The San Diego court based this conclusion primarily upon *Burbank v. Lockheed Terminal* (1973) 411 U.S. 624 [36 L.Ed.2d 547], a five to four decision of the United States Supreme Court in which the majority found implied federal preemption of aircraft noise control in the existence of a pervasive scheme of federal regulation of the subject.[2] (*Id.* at pp. 633, 638.) The majority, therefore, struck down a municipal curfew ordinance prohibiting night takeoffs of jet aircraft from the airport involved (*Id.* at pp. 625-626), apparently

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[2]In this connection we note, though, that total federal preemption of an area of regulation has been rejected by the United States Supreme Court in several other fields where a pervasive scheme of federal regulation exists. (See *De Canas v. Bica* (1976) 424 U.S. 351, 356 [47 L.Ed.2d 43, 49] (immigration); *Farmer v. Carpenters* (1977) 430 U.S. 290, 295-297 [51 L.Ed.2d 338, 346-348]; *Sears, Roebuck & Co. v. Carpenters* (1978) 436 U.S. 180, 198 [56 L.Ed.2d 209, 225] (labor relations); *Askew v. American Waterways Operators* (1973) 411 U.S. 325, 329, 336-337 [36 L.Ed.2d 280, 284, 288-289] (ocean oil spills).)

in the interest of national uniformity in jet aircraft flight scheduling. (*Id.* at pp. 639-640.)

The majority were careful to say, though, that the court was not considering what limits, if any, apply in this area to a municipality as a proprietor. (*Id.* at p. 635, fn. 14.) Since *Burbank,* the federal government has made clear in its monograph, entitled "Aviation Noise Abatement Policy", dated November 18, 1976, and issued by its Department of Transportation and its Federal Aviation Administration, and its Federal Aviation Administration, and in the administrative regulations regarding supersonic transports, that airport proprietors remain primarily responsible for planning and implementing action designed to reduce the effect of airport-associated noise on residents of surrounding areas (Aviation Noise Abatement Policy p. 5), and, as a result of congressional abstinence, airport proprietors remain responsible for regulation of their airports for noise abatement purposes through, among other things, noise-related airport use restrictions that are not unjustly discriminatory and do not impose an undue burden on foreign or interstate commerce. (43 Fed.Reg. 28417.)[3]

This deliberate federal refusal to preempt the local airport proprietor's responsibility for establishing and maintaining permissible levels of airport-associated noise was expressly recognized and affirmed in *British Airways Bd. v. Port Authority of New York* (2d Cir. 1977) 558 F.2d 75, 82-84. Likewise, in the second Concorde case, *British Airways v. Port Authority of*

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[3]According to the just-mentioned Department of Transportation-Federal Aviation Administration Aviation Noise Abatement Policy, dated November 18, 1976, much of the noise problem is airport-specific (p. 50) and there are at least 22 actions which an airport proprietor may wish to consider in developing an airport noise control plan. (See pp. 55-57.)

New York, Etc. (2d Cir. 1977) 564 F.2d 1002, 1010-1011, the court pointed out that the task of protecting the local population from airport noise falls upon the airport proprietor due to its intimate knowledge of local conditions, its ability to acquire the necessary property and easements and to assure compatible land use.

The fundamental fallacy of the *San Diego* decision lies in its assumption that excessive airport noise results only from the presence of jet aircraft in flight without recognizing that such possibly objectionable presence is also due to the existence of an airport whose location, runways, and noise abatement procedures, among other things, are under the direct and immediate control (subject, of course, to federal supervision) of the airport proprietor. (See *Griggs v. Allegheny County* (1962) 369 U.S. 84, 89 [7 L.Ed.2d 585, 588-589]; *City of Los Angeles v. Japan Airlines Co., Ltd.* (1974) 41 Cal.App.3d 416, 424; *National Aviation v. City of Hayward*, Cal. (N.D. Cal. 1976) 418 F.Supp. 417, 421.) In other words, airport noise control is essentially a shared responsibility of the federal government and the airport proprietor.

Moreover, the allowance of local nuisance actions against excessive airport noise constitutes a much lesser intrusion upon national aviation noise abatement policy than the local night curfew of jet aircraft takeoffs involved in the *Burbank* case.

Accordingly, we hold that the nuisance cause of action herein has not been federally preempted and,

in this connection, we call attention to the following language in the Federal Aviation Act of 1958: "Nothing contained in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies." (49 U.S.C. § 1506.)

II.

Civil Code Section 3482 does not Immunize the City from Nuisance Liability in this Case

Civil Code section 3482 provides: "Nothing which is done or maintained under the express authority of a statute can be deemed a nuisance." The City contends that the excessive noise to plaintiffs, emanating from jet aircraft using the north runways of LAX, is expressly authorized by statute and therefore, under section 3482, cannot be deemed a nuisance.

Like the trial court, we disagree. We do not doubt that the use of these runways by jet aircraft has been duly authorized by the City, and by the state and federal governments as well, whether by way of charter, statute, regulation, permit, or otherwise. What is lacking, though, is express authority for the level of noise injurious to plaintiffs that the trial court found to have occurred in this case, and without such authority, as the trial court also concluded, section 3482's protection of the adverse effects of the activity involved, does not attach. (See *Nestle v. City of Santa Monica* (1972) 6 Cal.3d 920, 938, fn. 16; *Varjabedian v. City of Madera* (1977) 20 Cal.3d 285, 291-292; *Hassell v. San Francisco* (1938) 11 Cal.2d 168, 171;

Venuto v. Owens-Corning Fiberglas Corp. (1971) 22 Cal.App.3d 116, 129.)

III.

The Award of Prejudgment Interest was Proper

Civil Code section 3288 provides, in pertinent part, that in an action for breach of an obligation not arising from a contract, interest may be given in the discretion of the jury. Where the trial involved is to the court, this direction as to whether to award prejudgment interest rests with the court. (*Bullis v. Security Pac. Nat. Bank* (1978) 21 Cal.3d 801, 814, fn. 16.)

We perceive no abuse of this statutory discretion in the awards of such interest here challenged. The starting dates for such interest that the trial court chose represent a midpoint between the start of the nuisance and the date of trial. (Cf. *Amador Valley Investors v. City of Livermore* (1974) 43 Cal.App.3d 483, 495.) In view of the fact that this litigation took some eight years at the trial level, the addition of prejudgment interest, while perhaps unprecedented for injury to feelings in this state and elsewhere (see Comment, *Interest as Damages in California* (1958) 5 UCLA L.Rev. 262, 264, 271; Rest., Torts, § 913(2)), seems justified in this exceptional situation. (Cf. *Moore McCormack Lines, Inc. v. Richardson* (2d Cir. 1961) 295 F.2d 583, 592-595, cert. denied 368 U.S. 989, 370 U.S. 937; *Petition of City of New York* (2d Cir. 1964) 332 F.2d 1006, 1008, cert. denied 379 U.S. 922.)

IV.

The Award of Attorneys' Fees must be Remanded for Further Proceedings

Counsel for plaintiffs were awarded $200,000 in attorneys' fees. They requested $352,960.50. The City has challenged this award as being excessive and otherwise improper,[4] and the trial court never explained what portion of this tripartite litigation its award of attorneys' fees covered—direct condemnation, inverse condemnation, and nuisance. Indeed, there is some question as to whether the plaintiffs in this case are entitled to recover their litigation expenses in direct condemnation under what is now Code of Civil Procedure section 1250.410. On the other hand, they are clearly entitled, pursuant to what is now Code of Civil Procedure section 1036, to the recovery of reasonable attorneys' fees for the work they did in the inverse condemnation aspect of this case.[5] But there would appear to be no basis whatsoever upon which they could be awarded attorneys' fees for the work they

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[4]Counsel for the City challenged 2,345.2 hours of the 4.296.4 hours claimed. The challenged time items were circled in red for the guidance of the trial court. Counsel for plaintiffs argued that they were entitled to twice their normal hourly rate because of the extraordinary length of the case and the uncertainty of their compensation. In addition, they pointed out that the case was unusually complex and had originally involved some 600 plaintiffs.

[5]Acording to counsel for the City, the recovery in the direct condemnation phase of this case (14 parcels) totals $720,000, which was only $56,000 more than the total amount of money the City offered for those parcels. Counsel for plaintiffs charged their clients according to their time records, $90,492.28 for their work in the direct condemnation proceedings, and $12,366.64 for their work in the inverse condemnation proceedings.

did in the nuisance phase of the case. (See Code Civ. Proc., § 1021; *Davis v. Air Technical Industries, Inc.* (1978) 22 Cal. 3d 1, 5; *Twentieth Century-Fox Film Corp. v. Harbor Ins. Co.* (1978) 85 Cal.App. 3d 105, 112-113.)

DISPOSITION

The judgment under appeal is affirmed. The order after judgment under appeal is affirmed in all respects except the provision therein for attorneys' fees, as to which it is reversed. The case is remanded to the trial court for the sole purpose of further proceedings to determine the proper amount of attorneys' fees to be awarded counsel for plaintiffs in this case, including what, if any, fees should be awarded them for their services on this appeal. Plaintiffs are otherwise awarded their costs on appeal.

CERTIFIED FOR PUBLICATION

Cobey, *J.*

We concur:

Klein, *P.J.*

Allport, *J.*

APPENDIX C.

Memorandum Opinion Re Intended Decision Regarding Recovery for Personal Injury and Emotional and Mental Distress.

Superior Court of the State of California for the County of Los Angeles.

Greater Westchester Homeowners' Association, etc., et al., Plaintiffs, vs. City of Los Angeles, etc., et al., Defendants. No. C 931 989.

This represents the final phase of the above-entitled action and involves the right of homeowners and family members to recover for personal injury and emotional and mental distress as a result of noise from jet aircraft using the North Runways of the Los Angeles International Airport. Two issues have already been determined in this litigation. One issue involved the fair market values of the homes sought to be acquired by the Airport for Airport uses in direct condemnation or eminent domain proceedings. The second issue previously determined involved the right of certain homeowners to recover in inverse condemnation for diminution in market values of their properties resulting from jet aircraft noise. The jury determined the awards in the first phase of this case dealing with these two issues. Plaintiffs in this case are all homeowners and their families living in the Westchester area adjacent to the North Runways.

The final phase of this action deals with the right of the same homeowners involved in the first phase of the action to recover from the City of Los Angeles damages for personal injury, annoyance, discomfort, and emotional and mental distress in addition to the amounts recovered for the market values of the homes

acquired for Airport use, or for the diminution in market values of the homes not sought to be acquired by the City. The theory upon which plaintiffs seek to recover damages for personal injury, mental and emotional distress, annoyance and discomfort caused by noise from jet aircraft operating in and out of the Los Angeles International Airport on the North Runways is that such operation by the Airport constitutes a "*nuisance.*" Plaintiffs rely for this theory of recovery upon the Supreme Court case of *Nestle vs. City of Santa Monica* (1972) 6 Cal.3d 920, 101 Cal.Rptr. 568. Plaintiffs urge that the *Nestle* case holds that jet aircraft noise from an airport's operation creates a cause of action in favor of homeowners and their families affected for personal injury and emotional and mental distress suffered by virtue of the provisions of Civil Code Section 3479.

Civil Code Section 3479 defines a nuisance as "Anything which is injurious to health, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, . . ." Defendant City seeks to avoid the effect of *Nestle* by asserting that the actual holding of *Nestle* is limited to a determination that the governmental immunity provisions of Government Code Section 815 do not bar a cause of action for nuisance against a governmental agency. Defendant City takes the position that *Nestle* does not deal with the effect of Civil Code Section 3482, which is a limitation upon Civil Code Section 3479, the section which defines a nuisance. Civil Code Section 3482 provides that: "Nothing which is done or maintained under *the express* authority of a statute can be deemed a nuisance." Defendant City contends that

the flight of commercial jet aircraft to and from the Los Angeles International Airport is expressly authorized under the terms of cited applicable local, state and federal statutes and that, consequently, jet aircraft flying to and from said Airport cannot be held to be a nuisance.

But Civil Code Section 3482 cannot be given the broad interpretation sought by defendant City. In *Venuto vs. Owens-Corning Fiberglas Corp.* (1971) 22 Cal.App.3d 116, 128, 99 Cal.Rptr. 350, the court stated that: "Adverting to section 3482 of the Civil Code, we note that the statute applies only to a *specific act authorized.*" (Emphasis added.) *Venuto* cites as its authority for this interpretation of Civil Code Section 3482 the cases of *Hassell vs. San Francisco* (1938) 11 Cal.2d 168, 78 P.2d 1021; *People vs. Glenn-Colusa Irr. Dist.* (1932) 127 Cal.App. 30, 15 P.2d 549; and *Ambrosini vs. Alisal Sanitary Dist.* (1957) 154 Cal.App.2d 720, 317 P.2d 33.

In describing its analysis of Civil Code Section 3482, the *Venuto* court added: "Accordingly, although an activity authorized by statute cannot be a nuisance, the *manner* in which the activity is performed may constitute a nuisance." (Emphasis in original.) (22 Cal.App.3d 116 at p. 129) Applying the principles stated in *Venuto* to the case at bench leads to the inevitable conclusion that the cited applicable state and federal statutes and regulations do *not* authorize the "specific act" of jet aircraft noise over and near the plaintiffs' homes of the magnitude and frequency to be injurious to health or indecent or offensive to the senses so as to interfere with the comfortable enjoyment of life or property—which constitutes a nuisance as defined by Civil Code Section 3479.

It is reasonable to conclude that although the "activity" of conducting the Los Angeles International Airport is authorized by statute and cannot therefore be considered a nuisance solely by reason of the defendant City's conducting such "activity," the "manner" in which such activity is performed may constitute a nuisance. The defendant City's acts of permitting jet aircraft to use the runways of the Los Angeles International Airport and emit the kind of noise which is injurious to health or offensive to the senses so as to interfere with plaintiffs' comfortable enjoyment of their homes constitute a *method* and *manner* of operating said Airport that creates a nuisance for which the defendant City becomes liable in damages.

Although the actual holding of *Nestle* is limited in the way in which defendant City asserts it to be, a careful reading of *Nestle* leads to the conclusion that the *dicta* of *Nestle* must be construed as strongly supporting the views of the *Venuto* case. In discussing its holding that governmental immunity cannot be considered a bar to the liability of a governmental entity for a nuisance under Civil Code Section 3479, the *Nestle* court states that the airport noise problem "vividly demonstrates the difficulties encountered in engrafting traditional common law theories of recovery onto proceedings involving injuries *peculiary contemporary in nature.*" (Emphasis added.) (6 Cal.3d 920 at p. 924) Also, in *Nestle,* the trial judge had ruled that plaintiffs had failed to state facts in their pleadings sufficient to state a cause of action for nuisance. The *Nestle* court held that the plaintiffs should be allowed to amend their complaint to *allege personal injuries* suffered as a result of the purported nuisance, and cited *Kornoff vs. Kingsburg Cotton Oil Co.* (1955) 45 Cal.2d 265, 288 P.2d 507.

That *Nestle* intended its *dicta* to be of significant consequence is seen from this additional statement made by the court after its reference to the problems of engrafting traditional common law theories of recovery onto proceedings involving injuries peculiarly contemporary in nature: "Despite the dilemma, however, we recall Justice Cardozo's admonition that '[t]hose who would earn [the common law's] best rewards must make their knowledge as deep as the science and as broad and universal as the culture of their day.' " (6 Cal.3d 920 at p. 924)

Also, it is to be noted that the *Nestle* court discusses the Legislature's intention derived from the 1970 legislation which rejected the Law Revision Commission's recommendations for legislation to bar suits against public entities based on a "nuisance" theory. In this respect, the *Nestle* court stated: "[C]onsequently it is manifest that the Legislature intended to allow such causes of action if they could be tailored to meet the specifications of statutory provisions, such as section 3479 of the Civil Code." (6 Cal.3d 920 at p. 936) The *Nestle* court then bolstered this view of the Legislature's intention by adding that "[t]his conclusion is further supported by the profound interest the 1970 Legislature demonstrated in the eradication of the evils caused by the various forms of pollution, with particular emphasis on noise pollution. Since it is well-documented that a nuisance theory provides an effective means for redress in a wide range of actions resulting from pollution including noise disturbance, it appears that, in deleting the commission's recommendation to preclude governmental nuisance liability, the Legislature intended to preserve this additional weapon in the arsenal available to combat grievous injury to the environment." (6 Cal.3d 920 at p. 936)

That the *Nestle* court intended to set forth a strong position that Civil Code Section 3482 should *not* constitute a bar to airport noise damage suits brought against airports on the theory of nuisance, is evident from the court's statements in footnote 16 on page 938 of the opinion. Here the court refers to the fact that the trial judge in *Nestle* concluded as a matter of law that the Santa Monica Airport was not a nuisance because it was maintained under the authority of several statutes which made Civil Code Section 3482 applicable in its mandate that "[n]othing which is done or maintained under the express authority of a statute can be deemed a nuisance." The court then points out that it was contended in *Hassell vs. San Francisco* (1938) 11 Cal.2d 168, 78 P.2d 1021, that because of Civil Code Section 3482, the construction of a public convenience station could not constitute a nuisance, but that in rejecting that argument in *Hassell*, the Supreme Court interpreted Section 3482 in a strict and narrow fashion as requiring that a statute must authorize the "*very act* which occasions the injury." (Emphasis added.) (11 Cal.2d 168 at p. 171)

Defendant City also takes the position that in the absence of proof of a true physical injury, plaintiffs are not entitled to recover damages on a nuisance theory because other items of damage, such as loss of use and enjoyment of their homes, have been included in the compensation certain of the plaintiffs as homeowners have already received by way of market value for their homes acquired by the Airport, or by way of damages for the diminution in the market values of homes not sought to be acquired by the Airport and still owned by the remaining plaintiffs. In support of this position, defendant City points out

that the damage item for loss of use and enjoyment of residential property resulting from jet aircraft noise, for which plaintiffs have already received such compensation, is based upon factors such as (1) sleep interference, (2) interference with speech and telephone communications, (3) interference with radio and television communication and enjoyment, (4) interference with the use of the out-of-doors portions of the home, (5) making entertainment of friends in the home practically impossible, (6) difficulties in finding persons willing to purchase the homes, and (7) difficulties in obtaining financing or loans from lending institutions.

Defendant City thus concludes that if recovery is permitted for such factors on the theory that they constitute damage to the person resulting from jet aircraft noise as a nuisance, plaintiffs will be receiving double recovery from the same acts of defendant City. Defendant City also alludes to the fact that this court previously ruled in the property-taking and property-damaging phase of the trial that plaintiffs were not entitled to recover, as a separate item of damages, for loss of use and enjoyment of their homes under the doctrine of *Klopping vs. City of Whittier* (1972) 8 Cal.3d 39, 104 Cal.Rptr. 1. The *Klopping* case established a rule for recovery of special damages to property in condemnation actions based upon the depressing effect upon market value of property of an unreasonable delay by a condemning agency in filing a condemnation action after making a precondemnation announcement of the intent to condemn, or in taking any other unreasonable action before a condemnation action was instituted which resulted in a diminution in the market value of an owner's property. But this court's ruling that plaintiffs were not entitled to recover

special damages for such items as loss of use and enjoyment under the *Klopping* doctrine has no bearing on the question of whether loss of enjoyment and use of residential property by an owner-occupant can be an item of damage to the *person*, as distinct from the question of the effect of loss of enjoyment and use in causing a diminution in the market value of an owner's property.

In addition to the question of whether loss of use and enjoyment of residential property as a compensable item is limited to its effect upon market value, we have the question of whether physical injury to the person is required before a person may recover damages on the ground of a nuisance for a *nonproperty* injury. That no physical injury to the person is required in order for a homeowner to recover damages for a non-property injury suffered from a nuisance, along with a property injury suffered in the form of physical injury to the home or a reduction in its market value, has been decided by the California Supreme Court in several cases.

But what kind of injury to the person that is not a physical injury will suffice to constitute a compensable item of damage for a defendant's nuisance? The decisional law indicates that a loss to the homeowner of the use and enjoyment of his home which results in his annoyance, discomfort, mental or emotional distress is a compensable injury insofar as a cause of action for trespass or a nuisance is concerned. This has been the law of nuisance long before the advent of jet aircraft.

In *Judson vs. L. A. Suburban Gas Co.* (1910) 157 Cal. 168, 171, 106 P. 581, the court stated the rule to be that "it is not necessary that the health of plaintiff or of members of his household should have been

impaired. It is sufficient if the odors, sounds, and smoke were offensive to the senses." This view was reiterated in the more recent case of *Kornoff vs. Kingsburg Cotton Oil Co.* (1955) 45 Cal.2d 265, 288 P.2d 507, a trespass case. The defendant argued that damages for discomfort and annoyance were erroneously awarded to plaintiffs since no physical injury to the person was proved. But the court rejected this argument and stated: "It appears to us that the *discomfort* and *annoyance* suffered by plaintiffs is an injury directly and proximately caused by defendant's invasion of their property and that such damages would naturally result from such an invasion. It also appears to us that *discomfort* and *annoyance* may be suffered where there is no physical injury suffered." (Emphasis added.) (45 Cal.2d 265 at p. 272)

The *Kornoff* court also stated the rule to be that "[t]he California cases appear to draw no distinction between cases involving nuisance and those involving trespass in permitting an award of damages for discomfort and annoyance directly resulting from an injury to real property. There seems to be no sound reason to refuse to award damages for discomfort and annoyance where the only injury is to the real property since it is obvious that such an injury may cause discomfort and annoyance *without also causing an actual physical injury to the person.*" (Emphasis added.) (45 Cal.2d 265 at p. 275)

Another case of significance on the question of the kinds of injury for which recovery is allowed in a nuisance action is *Herzog vs. Grosso* (1953) 41 Cal.2d 219, 259 P.2d 429. The *Herzog* court considered as relevant the trial court's finding that "as a direct, natural and proximate result and consequence of the

acts and conduct of the defendant . . . each of said plaintiffs were caused further to suffer nervousness, worry, and mental distress for the safety of themselves and their daughter and others." (41 Cal.2d 219 at p. 225) This finding was deemed relevant under the principle that "[o]nce a cause of action for trespass or nuisance is established, an occupant of land may recover damages for annoyance and discomfort that would naturally ensue therefrom." (41 Cal.2d 219 at p. 225)

In the *Kornoff* case, the defendant challenged the validity of *Herzog* to support a homeowner's recovery for annoyance and discomfort resulting from a nuisance by advancing the theory that the lack of sleep, fear and shock suffered by plaintiff in *Herzog* were actual injuries to the person and that discomfort and annoyance are recoverable items of damage in a nuisance or trespass case only if such items constitute an integral part of actual injury to the person. But *Kornoff* rejected this suggested interpretation of *Herzog* by stating: "We do not so construe *Herzog v. Grosso.* We specifically held that annoyance and discomfort were *natural consequences of such 'an invasion of a protectible interest in real property.'* " (Emphasis in original.) *Kornoff vs. Kingsburg Cotton Oil Co.* (1955) 45 Cal.2d 265, 273, 288 P.2d 507)

Kornoff was followed a few years later by *Acadia, California, Ltd. vs. Herbert* (1960) 54 Cal.2d 328, 337, 353 P.2d 294, in which the same principle was enunciated as follows: "It is settled that, regardless of whether the occupant of land has sustained physical injury, he may recover damages for the discomfort and annoyance of himself and the members of his family and for mental suffering occasioned by fear

for the safety of himself and his family when such discomfort or suffering has been proximately caused by a trespass or a nuisance."

Kornoff, Herzog, Acadia and *Judson,* therefore, constitute unquestioned authority for the rule that even if the nuisance created by a defendant is not of the type to cause physical illness, if it is of the type to cause a homeowner annoyance and discomfort, such annoyance and discomfort constitute recoverable elements of damage.

Although none of those cases involved recovery for damage from jet aircraft noise as a nuisance, there is no reason for making any distinction between a nuisance resulting from jet aircraft noise and a nuisance resulting from other forms of noxious odors, vibrations or sounds.

Although it may be labeled *dicta,* the California Supreme Court has indicated that the elements of damages resulting from a nuisance caused by jet aircraft noise fall in the same category as the elements of damage that are recoverable in the case of other forms of nuisance. In *City of San Jose vs. Superior Court* (1974) 12 Cal.3d 447, 115 Cal.Rptr. 797, the court rejected the concept that certain property owners could maintain, on behalf of all property owners in an area, a class action against an airport operator for a nuisance arising out of noise emanating from jet aircraft landing and taking off from such airport. One basis of rejection of the propriety of a class action lay in the court's view that the elements of damages recoverable for a nuisance were too varied and individualized to permit certain plaintiffs to represent all members of the class. Thus the *San Jose* court stated: "Damages recoverable in a successful nuisance action include not only diminu-

tion in market value but also damages for annoyance, inconvenience, and discomfort." (12 Cal.3d 447 at p. 464)

In light of the decisional-law history of damage recoveries in nuisance actions, this court concludes that California law permits, on a nuisance theory, recovery for damages suffered from jet aircraft noise in the form of personal injury, annoyance, inconvenience, discomfort, mental distress and emotional distess to the residential property owner and members of his family affected, in addition to damages in the form of a diminution in market value of such residential property.

Accordingly, this court must reject defendant City's contention that the damage element—diminution in market value of real property—includes the elements of annoyance, inconvenience, discomfort, mental and emotional distress to the owner so as to preclude any additional recovery for these latter items. There is no element of double recovery involved in permitting plaintiffs to recover damages both for diminution in market value of their residential properties and for the items of annoyance, discomfort, emotional and mental distress suffered by such plaintiffs as a result of the invasion of their homes by noise from jet aircraft using the North Runways of the Los Angeles International Airport, such noise being of sufficient severity and regularity to constitute a nuisance.

We now turn to the question of whether the noise from jet aircraft landing on and taking off from the North Runways of the Los Angeles International Airport was such as to constitute a nuisance within the meaning of Civil Code Section 3479. The test is simply whether, with respect to a particular parcel of residen-

tial property, the jet aircraft noise was of sufficient severity and regularity to be injurious to the health or indecent or offensive to the senses so as to interfere with the owner's comfortable enjoyment of his property.

The parties herein have stipulated and agreed that the evidence introduced in the property-taking and property-damaging phase of the trial—the direct condemnation and the inverse condemnation phase—is to be applicable to the nuisance phase—the personal injury and other nonproperty damage phase, to the extent that such evidence is relevant to the latter issues.

The evidence introduced in this action is voluminous. Expert testimony was presented relating to the fields of acoustics, sound analysis and measurements and the effects of noise on people in terms of consequences to hearing and other bodily functions.

The measurement of sound and noise has become fairly standardized. Through the use of a sound meter the maximum level of noise—unwanted sound—from any source is easily measurable. This physical measurement of sound or noise is recorded in terms of decibels on what is described as the A scale [dB(A)]. But the important consideration in terms of noise is how the human ear responds to sounds. A more accurate measurement in terms of the human response to sounds is known as the perceived noise level in decibels (PNd B). The PNdB measurement takes into account the various frequencies of any sound or noise event. Thus, a PNdB measurement of the noise from a jet aircraft engine will evaluate the fact that such noise comprises a sound spectrum made up of high frequency sounds as well as low frequency sounds and that the high frequency sounds are far more irritating to the human ear than are the low frequency sounds.

The evidence in this case at bench establishes that several methods have evolved for measuring jet aircraft noise in terms of multiple jet aircraft that use the runways of an airport on a daily basis. The methods of such noise measurements have evolved in an effort to determine or predict the probable effects of such multiple jet aircraft noise on residents living adjacent to airport runways. The specific concern in the case at bench is the effects of noise from jet aircraft that used the *North* Runways of the Los Angeles International Airport on those plaintiffs who were, and on some plaintiffs who still are, residents of the Westchester residential community adjacent to such North Runways.

All of the various methods of measurement of noise from jet aircaft using an airport are designed to take into account the cumulative effects from a number of factors—the fact that some types of jet aircraft are noisier than others, the difference in noise levels generated by aircraft take-offs from aircraft landings, the number of flights per day, and the fact that night flights are more disturbing to residents than are day flights because of the interference with sleep. Thus, it is recognized that the older types of jet aircraft such as the Boeing 707 and 727, the Douglas DC-8 and DC-9 are noisier than the later and newer models such as the Boeing 747, the Douglas DC-10 and the Lockheed L-1011. But the fleet of jet aircraft that uses the North Runways of the Los Angeles International Airport is still composed of a substantial number of the earlier and noisier jet aircraft models.

The purpose sought by the various methods developed for measuring jet aircraft noise in its cumulative effect is to express in a *single* decibel value the com-

munity's response to such noise over a daily, 24-hour period. Fluctuating noise levels over a given period of time is thus converted to a single-number equivalent. By use of these various noise measurement processes, contours or zones around the Los Angeles International Airport have been drawn to reflect specified noise levels or values at any location within a given radius of the runways--the two North Runways and the two South Runways.

The evidence presented by plaintiffs emphasizes the Composite Noise Rating (CNR) method of evaluating the cumulative effects of noise from jet aircraft operations. The CNR contours are based on the use of Perceived Noise Level measurements in terms of decibels (PNLdB). The CNR noise values are also based on a consideration that the person affected by jet aircraft noise has been subjected to such noise for a minimum period of six months. This eliminates from consideration the annoyance or discomfort experienced upon initial exposure to noise of this character.

The CNR contours are composed of three zones. Zone 1 is farthest from the North Runways and the CNR noise value or rating for this zone begins at 100 PNdB and decreases in decibel rating as the distance from the North Runways increases. Zone 2 has as its outer limits the 100 decibel line of Zone 1 and increases in excess of 100 PNdB as Zone 2 reaches Zone 3 where the decibel rating starts at 115 PNdB and increases in decibel rating as the area gets nearer to the North Runways.

According to studies of human responses by residents living near airports, the jet aircraft noise produced in CNR Zone 1, with its rating of less than 100 PNdB, causes few complaints from residents of Zone

1. But in CNR Zone 2, with its decibel rating of 100 to 115 PNdB, jet aircraft noise results in individual vigorous complaints from residents of Zone 2. And in CNR Zone 3, with its decibel rating in excess of 115 PNdB, jet aircraft noise results in concerted group action by residents of Zone 3.

According to some of the testimony, when a CNR rating reaches around 112 to 113 PNdB, three out of four residents will be annoyed; that at a CNR of around 100 PNdB, approximately one out of every two residents will be annoyed; but that at a CNR value of approximately 90 PNdB, only one out of every four persons subject to such noise exposure will be annoyed.

The CNR contours with the three zones were constructed on the assumption that, on an average daily basis, there were between two hundred and three hundred jet aircraft landings and take-offs on the North Runways of the Los Angeles International Airport. The evidence sustains this assumption. The jury in this case at bench made a finding that as of December 31, 1971, the average number of flights per day, including landings and take-offs, by jet aircraft, was 322 for Runway 24-L, the southerly of the two North Runways, and 26 for Runway 24-R, the northerly of the two North Runways.

In the Greater Westchester area, a portion of CNR Zone 2 includes an area north of Manchester Avenue and for a number of blocks extending east and west of Sepulveda Boulevard. CNR Zone 3 has its northerly boundary roughly along 88th and 90th Streets, which is north of the two North Runways in the Greater Westchester area, and its southerly boundary along

a line south of the two South Runways, 25-L and 25-R.

Most of the plaintiffs in the case at bench were residents of either Zone 3 or Zone 2.

The evidence presented by defendant City emphasizes the Community Noise Equivalent Level (CNEL) method of measuring and evaluating jet aircraft noise and community response thereto. The CNEL methodology is similar to the CNR method in its purpose—to express in a single number the noise level and the community response to such noise level over an average 24-hour period.

The CNEL method starts with the Single Event Noise Exposure Level (SENEL) which analyzes the sound produced during an entire single noise event such as one jet aircraft take-off. This includes more than the peak level moment. The CNEL value is arrived at by considering all the single event noise exposures over a 24-hour period and obtaining an average, but giving added weight to the night-time single events from 7:00 p.m. to 10:00 p.m. and to such single events from 10:00 p.m. to 7:00 a.m

An expert witness for the defendant City postulated that the CNEL method of evaluating noise was designed as a simpler method of measuring noise than the prior methods of decibels on the (A) scale [dB(A)], the Perceived Noise Level (PNdB), the Day-Night Level (LDN), the Noise Exposure Forecast (NEF) and the Composite Noise Rating (CNR). The claim of simplicity for the CNEL concept rests on the fact that it uses as its base the Single Event Noise Exposure Level (SENEL) which is calculated from sound meter decibel readings on the (A) scale [dB(A)] rather

than from judgmental factors involved in the Perceived Noise Level (PNdB) weighting process which is used in the CNR method.

CNEL contours were developed for the Los Angeles International Airport. Separate contours were drawn for CNEL values of 60dB, 65dB, 70dB, 75dB and 80dB. A comparison of CNEL values and CNR values indicates that the CNEL method produces a lower decibel value two-thirds of the time than the CNR method produces. The difference in decibel values between the CNEL and the CNR methods leads to the conclusion that, under the CNEL contours, particular residential locations near the Airport are less likely to result in owners' complaints from jet aircraft noise than that provided by the CNEL method. But this contours.

There is no dispute among the expert witnesses that the dB(A) scale of noise measurement used in the CNEL concept is a cruder measuring device than the PNdB scale used in the CNR concept. This conclusion results from the fact that measuring noise by the PNdB scale more adequately takes into account human reactions to the higher noise frequencies of a sound event than does the dB(A) scale. The high frequency sounds of the sound spectrum that make up a sound event are simply more objectionable and obnoxious to the human ear than are the low frequency sounds.

In terms of its evidentiary use on the issue of whether jet aircraft noise at a particular residential location constitutes a nuisance or not, the court finds that the CNR method provides evidence of greater credibility than that provided by the CNEL method. But this court is unwilling to adopt the thesis that jet aircraft noise is automatically a nuisance as to all residential

properties located in CNR Zones 2 or 3 and is automatically not a nuisance as to all residential properties located in CNR Zone 1. Neither the CNR method of evaluating jet aircraft noise nor the CNEL method can be accepted as compelling evidence that such noise at any particular location automatically comes within the definition of a nuisance under Civil Code Section 3479.

The court and jury in this case at bench took an extensive view of the area involved and heard the jet aircraft noise at different locations and at different hours of the day. This view constitutes evidence along with all other evidence presented to be considered by this court in determining whether jet aircraft noise constituted a nuisance at the residential location of each plaintiff seeking to recover damages from the defendant City on a nuisance theory.

All of the evidence in this case at bench satisfies this court that the noise from jet aircraft using the North Runways constitutes a nuisance as to the residential location of each of the plaintiffs except that of the Tadenz Dudzinski family located at 8359 Kenyon Avenue, located in CNR Zone 1 with a noise value or level less than 100 PNdB. The residential locations of all other plaintiffs are in CNR Zone 2 with a noise value or level of between 100 and 115 PNdB, or in CNR Zone 3 with a noise value or level in excess of 115 PNdB. This finding of nuisance is based on this court's determination that at each such residential location the noise from jet aircraft using the North Runways has been of such duration, intensity and obnoxious character as to cause a diminution in market value of the property at such location and to be injurious to health and offensive to the senses so as

to interfere with the family's comfortable enjoyment of life and of such property.

We turn next to the question of proof of damages sustained by plaintiffs. The period of time we are concerned with in this phase of the case begins with June 1967 when commercial jet aircraft were authorized to land and take off from the first North Runway, 24-L. In June of 1970, construction of the second North Runway, 24-R, was completed and commercial jet aircraft were authorized to land and take off from this runway on a regular basis. Thus, the nuisance for which damages must be calculated was created beginning in June 1967.

For the most part, plaintiffs' claims of physical injuries resulting from jet aircraft noise are unsubstantiated by the evidence. Practically no medical testimony was offered to prove any physical injury. In the case of one plaintiff, however, her family physician testified that she had physical problems that were aggravated by emotional distress suffered from the jet aircraft noise.

An ear, nose and throat specialist testified that he had sent twenty plaintiffs to a laboratory for hearing tests and that the hearing loss indicated for nine of these plaintiffs could have been due to jet aircraft noise. This opinion was based in great measure upon a history obtained from the plaintiffs in order to rule out causes of hearing loss or impairment other than jet aircraft noise. But this history was filled out by the plaintiffs at their homes on a form supplied by the physician. The physician did not discuss personally with the plaintiffs any hearing problems they may have experienced. The laboratory hearing tests were performed shortly before the final phase of the trial commenced.

It is important to note that the physician-witness' testimonial opinion regarding the cause of the hearing losses or impairments diagnosed for the nine plaintiffs was couched primarily in terms of a *possibility* that such hearing losses or impariments were the results of jet aircraft noise rather than in terms of reasonable medical probability or certainty. There was conflicting testimony by experts as to whether jet aircraft noise can cause permanent hearing loss or impariment. But none of these experts made any examination of plaintiffs to determine whether there had been any hearing loss or hearing impairment suffered from any cause. The evidence presented as to hearing impairment or hearing loss must be considered as conjecture and speculation. The court concludes, therefore, that plaintiffs have not sustained their burden of proving that any significant hearing loss or hearing impairment was suffered by any plaintiff as a result of jet aircraft noise.

The testimony of the plaintiffs as to the effects suffered by them from jet aircraft noise was, for the most part, along similar lines. This testimony established that the jet aircraft noise interfered with person-to-person conversation in the home, with the ability to engage in normal telephonic communication, with the ability to enjoy the use of the out-of-doors portion of their property and with the ability to hear and enjoy television programs; that such noise caused frequent arousal from sleep and, in some cases, interfered with the ability to engage in or to enjoy sexual relations. With respect to family members of school age, the testimony was to the effect that the jet aircraft noise interfered with the ability to study in the home.

There was testimony that as a result of these noise interference factors, plaintiffs developed a sense or feeling of annoyance, strain, worry, anger, frustration, ner-

vousness, fear, and irritability toward other family members. These are all appropriate elements of nuisance damage which may be classified, for convenience, under the general heading of mental and emotional distress.

There was wide variation, however, in the testimony between plaintiffs as to the degree of mental and emotional distress flowing from such elements. The evidence convinces the court that the mental and emotional distress caused by jet aircraft noise was very slight as to some plaintiffs while moderate and substantial as to others. But the evidence failed to establish that any plaintiff suffered a severe or grievous degree of mental or emotional distress as a result of the jet aircraft noise.

Much of the testimony as to anger, frustration and emotional disturbance was related to causes other than the jet aircraft noise. Thus, some of the plaintiffs developed a sense of frustration and anger because the Airport expansion was changing the character of the Westchester residential community. Some of the plaintiffs were resentful of the fact that the Airport could acquire their homes through eminent domain proceedings. Others became upset at the Airport because of what they considered to be offers to purchase their properties at prices below market value. Some plaintiffs testified to substantial emotional and mental conditions that developed while such plaintiffs were subject to jet aircraft noise. But in these instances, the evidence points clearly to the fact that such conditions were caused by family problems of one kind or another and not by the jet aircraft noise.

These elements of anger, resentment, frustration and other emotional and mental distress that result from causes other than that of jet aircraft noise are not compensable items.

In determining the amount of damages to be awarded for the nonproperty elements of nuisance damage classified as mental and emotional distress, the court has taken into consideration the degree of such distress which the evidence establishes each plaintiff was caused to suffer from jet aircraft noise and the length of time that such plaintiff was subjected to the jet aircraft noise.

The evidence reflects that a few plaintiffs moved into the Westchester area after the commencement of jet aircraft operations to and from the North Runways. As to these plaintiffs, the defendant City asserts that their claims ought to be precluded by the defense of assumption of risk. But is assumption of risk a defense to a cause of action for a nuisance? In an early case, *Learned v. Castle* (1889) 78 Cal. 454, 18 P. 872, the court declared that the acquiescence of plaintiff's grantor in an act of the defendant that constituted a nuisance was no defense to plaintiff's cause of action for an injunction against a continuance of the nuisance.

In *Williams v. Blue Bird Laundry Co.* (1927) 85 Cal.App. 388, 259 P. 484, one question presented was the right of plaintiff who had built a residence in an area where defendant laundry was already operating to maintain a nuisance action against the laundry. The court held that plaintiff was not barred from relief and stated the rule to be as follows: "It seems to be assumed that because the premises on which the laundry is situated were zoned to permit the maintenance of such establishments, all persons building residences in that vicinity must submit to such discomforts and injuries as are ordinarily incident to the operation of similar industries in the manner in which they

are customarily conducted. We do not understand this to be the law. The doctrine of *coming to a nuisance* was long ago exploded." (Emphasis added.) (85 Cal. App. 388 at p. 392)

The *Learned and Williams* cases set forth the rule that a plaintiff's coming into an area where a nuisance is operating does not bar such plaintiff from maintaining an action for an existing nuisance. It follows, therefore, that assumption of risk is not a defense to an action to recover damages for a nuisance.

There is an additional matter which requires discussion in terms of the effects of plaintiffs' rights of recovery in this jet aircraft noise litigation based upon a *nuisance* theory. A few of the plaintiffs involved in this litigation are plaintiffs whose properties have not been sought to be taken by the defendant City in any direct condemnation action. The question which this court raises is as to the transitory or terminal nature of the recovery which this court is granting to these plaintiffs for emotional and mental distress. In *Nestle v. City of Santa Monica* (1972) 6 Cal.3d 920, 101 Cal.Rptr. 568, the court discusses the question of whether jet aircraft noise constitutes a continuing nuisance because of the defense involved of the statute of limitations. The *Nestle* court remarked: "If appellants demonstrate that whatever nuisance caused by defendant is continuing in nature, every repetition of the wrong may create further liability. Hence the statute of limitations would not run merely from the original intrusion. This is the well-settled rule with respect to property damage (citation), and it would be incongruous for each repetition to be considered a separate wrong for property damage purposes but not for personal injuries. To the extent *Strzelczyk v. Marki* (1959)

169 Cal.App.2d 703 [337 P.2d 846], adopts a contrary position, it is disapproved. Accordingly, if the statute of limitations becomes an issue, the trial court must determine whether nuisance causing personal injury loss has concluded or is continuing and then apply the appropriate statute of limitations principles." (6 Cal.3d 920 at p. 937)

The plaintiffs who are being awarded damages for mental and emotional distress and who still reside at the same addresses are the *Ferrers,* 8701 Lilienthal Avenue; the *Heaps,* 8820 Lilienthal Avenue; the *Lemons,* 8721 Lilienthal Avenue; and the *Citros,* 5951 West 86th Place. Under the authority of the *Nestle* case, the noise from jet aircraft using the North Runways will continue to constitute a nuisance at these addresses unless there is a substantial reduction in the decibel noise level in the future. The awards to these plaintiffs will not constitute a bar to future claims by these plaintiffs against the defendant City for damages for the continuing emotional and mental distress caused by the *continuing nuisance* of noise from jet aircraft that use the North Runways.

In addition to the above four plaintiff families, there are undoubtedly other homeowners in the same general area or in other areas of CNR Zones 2 and 3 as to whom the jet aircraft noise constitutes a nuisance and whose homes the defendant City has not sought to purchase by agreement or acquire through condemnation proceedings for Airport use.

If the City of Los Angeles desires to avoid the continuing liability for jet aircraft noise that constitutes a nuisance and causes physical injury or emotional and mental distress to homeowners such as the Ferrers, Heaps, Citros and Lemons and others living in CNR

Zones 2 and 3, several alternatives come readily to mind.

One alternative is for the City of Los Angeles to secure a substantial reduction in the jet aircraft decibel noise level at the home locations involved in order to terminate the jet aircraft noise as a nuisance. A second alternative is for the City to acquire these homes from their owners for Airport purposes through voluntary agreements with such owners or through direct condemnation actions. A third alternative that has been suggested is that of soundproofing these residential properties.

It may be contended that neither the remedy of a reduction in the jet aircraft noise level nor the remedy of soundproofing of the residential properties involved is a feasible or practical solution in the near future. Certainly, it is not for this court to suggest which, if either, of these two alternatives, offers a practical or feasible solution to the continuing nuisance created by jet aircraft noise.

But this court does suggest unequivocally and unhesitatingly that homeowners ought not to be forced to live with the present situation of being subject to the nuisance of jet aircraft noise and be content with the remedy of suing the City of Los Angeles periodically for damages for physical injuries or mental and emotional distress that may result from such jet aircraft noise.

We turn next to the matter of fixing the amount of damages to be awarded plaintiffs for the physical, mental and emotional distress suffered as a result of the nuisance of jet aircraft noise invading their homes.

BOOSALIS. The residence location was 9428 Fleetwing Avenue. The period the family lived at this address was approximately one year in 1967-1968. The awards are as follows:

Anthony Boosalis	$ 700.00
Barbara Boosalis	400.00
Dorothy Boosalis	400.00
Anthony Boosalis, Jr.	400.00
Christine Boosalis, Whitney	400.00

CITRO. The residence location is 5951 West 86th Place. The period for which damages are awarded is from 1967 to date. The awards are as follows:

Sam Citro	$3,200.00
Mamie Citro	3,200.00

DAILEY. The residence location was 9512 Hoxey Avenue. The period for which damages are awarded covers a five-year period from 1967 to 1972 for Janette Dailey and Don Dailey, and a seven-month period divided between 1967 and 1970 for Gail Dailey Williamson and Roblyn Williamson. The awards are as follows:

Janette Dailey	$5,000.00
Don Dailey	1,700.00
Gail Dailey Williamson	400.00
Roblyn Williamson	400.00
Rebecca Williamson -	No Recovery

DECKER. The residence location was 9401 Goebel Avenue. The period for which damages are awarded covers close to seven years, from 1967 to 1974, for Mahria Decker and Deborah Decker, and approxi-

mately four and one-half years, from 1967 to 1972, for Gregory Decker. The awards are as follows:

Mahria Decker		$3,500.00
Gregory Decker		1,600.00
Deborah Decker		2,500.00
Alexander Decker	-	No Recovery

FERRER. The residence location is 8701 Lilienthal Avenue. The period for which damages are awarded is from 1967 to date for Al B. Ferrer and from 1969 to date for Roberta Ferrer. The awards are as follows:

Al B. Ferrer	$3,200.00
Roberta Ferrer	2,500.00

FONTECCHIO. The residence location was 7401 West 93rd Place. The period for which damages are awarded is from 1967 to 1972. The award to Nicholas A. Fontecchio is in the sum of $3,000.00.

GAUL. The residence locations are two in number: 8555 Trouville Avenue in Playa Del Rey and 9333 Kellyfield Avenue in Westchester. The period for which damages are awarded cover a one-year period at the Trouville Avenue location during 1967-1968 and a five-year period at the Kellyfield Avenue location from 1968 to 1973. The awards are as follows:

Edward R. Gaul		$2,500.00
Alice Gaul		1,500.00
Darlene Gaul Tydlaska		1,500.00
Darryl Gaul	-	No Recovery
Lynette Gaul Vesco	-	No Recovery

HEAP. The residence location is 8820 Lilienthal Avenue. The period for which damages are awarded is from 1967 to date. The awards are as follows:

George Heap	$3,200.00
Willie Heap	4,200.00

HEHN. The residence location was 9187 Ingleport Avenue. The period for which damages are awarded is from 1967 to 1973. The awards are as follows:

Sidney Hehn	$3,500.00
Doreen Hehn	3,500.00

LEMON. The residence location is 8712 Lilienthal Avenue. The period for which damages are awarded is from 1967 to date. The awards are as follows:

Richard Lemon	$3,000.00
Eleanor Lemon	3,000.00
Robert Lemon	900.00
James Lemon	900.00

MEYERS. The residence location was 9400 Belford Avenue. The period for which damages are awarded is from 1967 to 1971. The awards are as follows:

Harry Meyers	$1,600.00
Julia Meyers	2,500.00

RUTHS. The residence location is 9037 Fleetwing Avenue. The period for which damages are awarded is from 1967 to date. The awards are as follows:

Lois Ruths	$4,500.00
Kathy Ruths	4,500.00

STINE. The residence location is 7361 West 93rd Place. The period for which damages are awarded is from 1967 to date. The awards are as follows:

Russell W. Stine	$3,200.00
Margaret S. Stine	4,200.00

VON WERDER. The residence location is 9147 Goebel Avenue. The period for which damages are awarded covers approximately ten months during 1967-1968. The awards are as follows:

Gerald Von Werder	$ 600.00
Margarita Von Werder	600.00
Robert Von Werder	300.00
Gerald Von Werder, Jr.	300.00
Danny Von Werder	300.00

WHITE. The residence location was 9163 Ingleport Avenue. The period for which damages are awarded is from 1967 to 1972. The awards are as follows:

Duane White	$2,000.00
Mary Lou White	2,000.00

The Dudzinski family, as to whom no award of damages is made because of the court's finding that jet aircraft noise at the location, 8359 Kenyon Avenue, does not constitute a nuisance, includes the following members: Tadenz, Witold, Bogdan, Magali and Christianne.

The parties have stipulated in this case at bench that each homeowner plaintiff who was seeking damages for personal injury and mental and emotional distress caused by jet aircraft noise has received an award through trial or has made a settlement with defendant city with respect to his claim for damage to his

residential property based on a reduction in its market value.

Evidence was introduced on behalf of all persons to whom an award of damages has been granted for personal injury and mental and emotional distress. It appears, however, that some of these persons may not have been listed properly as plaintiffs in the First Amended Complaint which formed the basis for the second phase of this trial. The court, therefore, orders that the First Amended Complaint shall be amended to add by interlineation on page 102 thereof, lines 10 to 32, the names of those persons as to whom recovery is permitted or denied by this Memorandum Opinion and who may not be set forth in said First Amended Complaint by such names as plaintiffs.

During the course of this litigation, numerous plaintiffs and the defendant City were able to reach settlements of such plaintiffs' claims for damages for physical injury and mental and emotional distress alleged to have been suffered as a result of noise from jet aircraft using the North Runways. The claims of 50 plaintiffs remained the subject of trial and determination by this court.

The awards for physical injury and mental and emotional distress being made herein total $86,800.00. These awards are granted to 41 plaintiffs who make up 15 families. The nine plaintiffs as to whom no awards are granted consist of one family of five and four minors from three families to whom awards are granted to other members thereof.

Dated this 30th day of September, 1975.

BERNARD S. JEFFERSON
Judge of the Superior Court

APPENDIX "D."

Federal Aviation Act of 1958.
49 U.S.C., 1301 et seq.

Provisions Involved:

[49 U.S. Code 1304]. "There is hereby recognized and declared to exist in behalf of any citizen of the United States a public right of freedom of transit through the navigable airspace of the United States."

[49 U.S. Code 1348]. "(a) The Administrator is authorized and directed to develop plans for and formulate policy with respect to the use of the navigable airspace; and assign by rule, regulation, or order the use of the navigable airspace under such terms, conditions, and limitations as he may deem necessary in order to insure the safety of aircraft and the efficient utilization of such airspace. He may modify or revoke such assignment when required in the public interest."

"(c) The Administrator is further authorized and directed to prescribe air traffic rules and regulations governing the flight of aircraft, for the navigation, protection, and identification of aircraft, for the protection of persons and property on the ground, and for the efficient utilization of the navigable airspace, including rules as to safe altitudes of flight and rules for the prevention of collision between aircraft, between aircraft and land or water vehicles, and between aircraft and airborne objects."

[49 U.S.C. 1431]. (a) For purposes of this section:

(1) The term "FAA" means Administrator of the Federal Aviation Administration.

(2) The term "EPA" means the Administrator of the Environmental Protection Agency.

(b)(1) In order to afford present and future relief and protection to the public health and welfare from aircraft noise and sonic boom, the FAA, after consultation with the Secretary of Transportation and with EPA, shall prescribe and amend standards for the measurement of aircraft noise and sonic boom and shall prescribe and amend such regulations as the FAA may find necessary to provide for the control and abatement of aircraft noise and sonic boom, including the application of such standards and regulations in the issuance, amendment, modification, suspension, or revocation of any certificate authorized by this title. No exemption with respect to any standard or regulation under this section may be granted under any provision of this Act unless the FAA shall have consulted with EPA before such exemption is granted, except that if the FAA determines that safety in air commerce or air transportation requires that such an exemption be granted before EPA can be consulted, the FAA shall consult with EPA as soon as practicable after the exemption is granted.

(2) The FAA shall not issue an original type certificate under section 608(a) of this Act for any aircraft for which substantial noise abatement can be achieved by prescribing standards and regulations in accordance with this section, unless he shall have prescribed standards and regulations in accordance with this section which apply to such aircraft and which protect the public from aircraft noise and sonic boom, consistent with the considerations listed in subsection (d).

(c)(1) Not earlier than the date of submission of the report required by section 7(a) of the Noise Control Act of 1972, EPA shall submit to the FAA proposed regulations to provide such control and abatement of

aircraft noise and sonic boom (including control and abatement through the exercise of any of the FAA's regulatory authority over air commerce or transportation or over aircraft or airport operations) as EPA determines is necessary to protect the public health and welfare. The FAA shall consider such proposed regulations submitted by EPA under this paragraph and shall, within thirty days of the date of its submission to the FAA, which publish the proposed regulations in a notice of proposed rulemaking. Within sixty days after such publication, the FAA shall commence a hearing at which interested persons shall be afforded an opportunity for oral (as well as written) presentations of data, views, and arguments. Within ninety (90) days after the conclusion of such hearing and after consultation with the EPA, the FAA shall—

(A) in accordance with subsection (b), prescribe regulations (i) substantially as they were submitted by EPA, or (ii) which are a modification of the proposed regulations submitted by EPA, or

(B) publish in the Federal Register a notice that it is not prescribing any regulation in response to EPA's submission of proposed regulations, together with a detailed explanation providing reasons for the decision not to prescribe such regulations and a detailed analysis of and response to all documentation or other information submitted by the Environmental Agency with such proposed regulations.

(2) If EPA has reason to believe that the FAA's action with respect to a regulation proposed by EPA under paragraph (1)(A)(ii) or (1)(B) of this subsection does not protect the public health and welfare

from aircraft noise or sonic boom, consistent with the considerations listed in subsection (d) of this section, EPA shall consult with the FAA and may request the FAA to review, and report to EPA on, the advisability of prescribing the regulation originally proposed by EPA. Any such request shall be published in the Federal Register and shall include a detailed statement of the information on which it is based. The FAA shall complete the review requested and shall report to EPA within such time as EPA specifies in the request, but such time specified may not be less than ninety days from the date the request was made. The FAA's report shall be accompanied by a detailed statement of the FAA's findings and the reasons for the FAA's conclusions; shall identify any statement filed pursuant to section 102(2)(c) of the National Environmental Policy Act of 1969 with respect to such action of the FAA under paragraph (1) of this subsection; and shall specify whether (and where) such statements are available for public inspection. The FAA's report shall be published in the Federal Register, except in a case in which EPA's request proposed specific action to be taken by the FAA, and the FAA's report indicates such action will be taken.

(3) If, in the case of a matter described in paragraph (2) of this subsection with respect to which no statement is required to be filed under such section 102(2)(C), the report of the FAA indicated that the proposed regulation originally submitted by EPA should not be made, then EPA may request the FAA to file a supplemental report, which shall be published in the Federal Register within such a period as EPA may specify (but such time specified shall not be less than ninety days from the date the request was

made), and which shall contain a comparison of (A) the environmental effects (including those which cannot be avoided) of the action actually taken by the FAA in response to EPA's proposed regulations, and (B) EPA's proposed regulations.

(d) In prescribing and amending standards and regulations under this section, the FAA shall—

(1) consider relevant available data relating to aircraft noise and sonic boom, including the results of research, development, testing, and evaluation activities conducted pursuant to this Act and the Department of Transportation Act;

(2) consult with such Federal, State, and interstate agencies as he deems appropriate;

(3) consider whether any proposed standard or regulation is consistent with the highest degree of safety in air commerce or air transportation in the public interest;

(4) consider whether any proposed standard or regulation is economically reasonable, technologically practicable, and appropriate for the particular type of aircraft, aircraft engine, appliance, or certificate to which it will apply; and

(5) consider the extent to which such standard or regulation will contribute to carrying out the purposes of this section.

(e) In any action to amend, modify, suspend, or revoke a certificate in which violation of aircraft noise or sonic boom standards or regulations is at issue, the certificate holder shall have the same notice and appeal rights as are contained in section 609, and in any appeal to the National Transportation Safety Board, the Board may amend, modify, or reverse the

order of the FAA if it finds that control or abatement of aircraft noise or sonic boom and the public health and welfare do not require the affirmation of such order, or that such order is not consistent with safety in air commerce or air transportation.

APPENDIX "E."

Airport and Airway Development Act of 1970.
49 U.S. Code 1701 et seq.

Provisions Involved:

"The Congress hereby finds and declares—

"That the Nation's airport and airway system is inadequate to meet the current and projected growth in aviation.

"That substantial expansion and improvement of the airport and airway system is required to meet the demands of interstate commerce, the postal service, and the national defense.

"That the annual obligational authority during the period July 1, 1970, through September 30, 1980, for the acquisition, establishment, and improvement of air navigational facilities under the Federal Aviation Act of 1958 (49 U.S.C. 1301 et seq.), should be no less than $250,000,000."

APPENDIX "F."

Noise Control Act of 1972.
PL 92-574.

Provisions Involved:

"Sec. 611. (a) For purposes of this section:

"(1) The term 'FAA' means Administrator of the Federal Aviation Administration.

"(2) The term 'EPA' means the Administrator of the Environmental Protection Agency.

"(b) (1) In order to afford present and future relief and protection to the public health and welfare from aircraft noise and sonic boom, the FAA, after consultation with the Secretary of Transportation and with EPA, shall prescribe and amend standards for the measurement of aircraft noise and sonic boom and shall prescribe and amend such regulations as the FAA may find necessary to provide for the control and abatement of aircraft noise and sonic boom, including the application of such standards and regulations in the issuance, amendment, modification, suspension, or revocation of any certificate authorized by this title. No exemption with respect to any standard or regulation under this section may be granted under any provision of this Act unless the FAA shall have consulted with EPA before such exemption is granted, except that if the FAA determines that safety in air commerce or air transportation requires that such an exemption be granted before EPA can be consulted, the FAA shall consult with EPA as soon as practicable after the exemption is granted."